No. 78-740

In the Supreme Court of the United States

OCTOBER TERM, 1978

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR ET AL.,
APPELLANTS

v.

L. DOUGLAS ALLARD, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

JURISDICTIONAL STATEMENT

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OPINION BELOW

The opinion of the three-judge district court (App. A, *infra*, 1a-15a) is not yet reported.

JURISDICTION

This case was decided by a three-judge district court convened under 28 U.S.C. (1970 ed.) 2282. Judgment was entered on June 7, 1978 (App. B, *infra*, 16a-17a). A notice of appeal to this Court

was filed on July 5, 1978 (App. C, *infra*, 18a-19a). On September 12, 1978, Mr. Justice White extended the time for docketing the appeal to and including November 2, 1978. This Court's jurisdiction is invoked under 28 U.S.C. 1253. As discussed below, the propriety of convening the three-judge court and hence the jurisdiction of this Court are questioned.

QUESTION PRESENTED

Whether the Secretary of the Interior has authority under the Eagle Protection Act, 16 U.S.C. 668 *et seq.*, and the Migratory Bird Treaty Act, 16 U.S.C. 703 *et seq.*, to forbid commercial transactions in birds and parts of birds that were lawfully killed prior to the date their species came under legal protection, as a means of preventing living birds from being killed for commercial purposes inasmuch as there is no effective way of distinguishing old bird feathers from new ones.

STATUTES AND REGULATIONS INVOLVED

Sections 1 and 2 of the Eagle Protection Act, as amended, 16 U.S.C. 668 and 668a; Sections 2, 3, and 12 of the Migratory Bird Treaty Act, 16 U.S.C. 703, 704, and 711; and pertinent regulations of the Secretary of the Interior, 50 C.F.R. 22.2(a) and 50 C.F.R. 21.2(a), are set forth in Appendix D, *infra*, 20a-25a.

STATEMENT

1. The Eagle Protection Act, 16 U.S.C. 668 *et seq.*, was enacted in 1940 (54 Stat. 250). At that

time the Act protected only the bald eagle, but it was amended in 1962 to protect the golden eagle as well (76 Stat. 1246). Section 1 of the Act, 16 U.S.C. 668, makes it unlawful to possess, take, buy, sell, or transport any bald eagles or golden eagles, or their parts, except as permitted by the Act. It provides, however, that if such eagles were lawfully taken before the Act was enacted or amended to protect them, nothing in the Act prohibits the "possession or transportation" of those particular eagles or their parts.

The Secretary of the Interior has issued regulations, 50 C.F.R. 22.2(a), interpreting this proviso of the Eagle Protection Act. The regulations provide that eagles or parts of eagles lawfully acquired before the date they came under the Act's protection "may be possessed or transported" without a permit issued under the Act, "but may not be imported, exported, purchased, sold, traded, [or] bartered * * *." In interpreting the Act to prohibit the buying and selling of birds and parts of birds lawfully acquired before the date of the Act's protection, the Secretary sought to assure that living birds protected by the Act are not killed for commercial purposes. Because it is virtually impossible to distinguish the feathers of recently killed eagles from the feathers of eagles killed a long time ago, an incentive to kill eagles for the value of their feathers would persist as long as artifacts containing new feathers could be sold in the guise of pre-Act artifacts.

The Migratory Bird Treaty Act, 16 U.S.C. 703 *et seq.*, was originally enacted in 1918 and was amended in 1936 (49 Stat. 1556) and 1974 (88 Stat. 190). Section 2 of the Act, 16 U.S.C. 703, makes it unlawful to take, possess, buy, sell, or transport any migratory bird protected by one of the treaties implemented by the Act, or the parts or products of such a bird, except as permitted by regulations issued under the Act.[1] Neither the original Act nor its amendments say anything, by way of either exemption or inclusion, about birds or bird parts that were lawfully taken or acquired before the effective date of the Act's protection.

The Secretary of the Interior is authorized by Section 3 of the Migratory Bird Treaty Act, 16 U.S.C. 704, "in order to carry out the purposes" of the treaties, to adopt regulations specifying "when, to what extent, if at all, and by what means, it is compatible with the terms of the [treaties]" to allow the "killing, possession, sale, purchase, shipment, [or] transportation" of any bird or part of a bird covered by the Act. Invoking this authority, the Secretary has issued the regulation found at 50 C.F.R. 21.2(a). It provides that birds and parts of birds covered by the Act that were lawfully acquired prior to the date of the Act's protection may be possessed and transported without a permit issued under the Act, but

[1] Section 12 of the Act, 16 U.S.C. 711, however, forecloses the issuance of regulations prohibiting the sale of migratory birds "bred on farms and preserves" for "the purpose of increasing the food supply."

may not be bought or sold. Again, the purpose of the prohibition on trade is to prevent the killing of living birds for commercial purposes, in view of the practical impossibility of distinguishing new feathers from old feathers.

2. Appellees filed this action in the United States District Court for the District of Colorado against the Secretary and certain of his subordinates. Appellees alleged that they are owners, sellers, and appraisers of American Indian artifacts containing the feathers of birds protected by the Eagle Protection Act or the Migratory Bird Treaty Act, "which birds were obtained prior to the effective date" of protection under the applicable Act (Complaint at 2, 3, 4, 5, 6). Appellees alleged that they would be harmed in their businesses and their property if commercial transactions in such artifacts were forbidden. They attacked the two statutes and the regulations issued under them on a variety of grounds, including constitutional ones. Because injunctive relief was sought, and because the district court took the view that the constitutional arguments were not frivolous, a three-judge court was convened pursuant to 28 U.S.C. (1970 ed.) 2282.[2]

Appellees contended that the Eagle Protection Act and the Migratory Bird Treaty Act should not be interpreted as applying to feathers from birds lawfully killed before the species came under legal protection.

[2] This statute was repealed by the Act of August 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119. Section 7 of the 1976 Act (90 Stat. 1120) provides that it does not apply to actions commenced prior to the date of enactment.

They claimed that the Secretary, by interpreting the Acts to prohibit commercial activity in such preexisting artifacts, had exceeded his authority. They further claimed that if the Secretary's regulations were authorized by the Acts, then the prohibition of commercial activity in previously acquired bird parts constituted a taking of property without due process in violation of the Fifth Amendment, and an arbitrary and irrational restriction beyond the constitutional powers of Congress.[3] None of the appellees alleged, however, that he or she had acquired any such bird parts, or any artifacts containing such bird parts, prior to the applicable statutory date.

On cross-motions for summary judgment, the district court ruled for appellees. The court decided no constitutional issue, but expressed "grave doubts whether these two acts would be constitutional if they were construed to apply to pre-act bird products" (App. A, *infra*, 13a). To avoid these constitutional doubts, the court interpreted the Acts as "not applicable to preexisting, legally-obtained bird parts or products therefrom," and accordingly held the Secretary's regulations invalid in so far as they prohibit

[3] In addition, appellees claimed that the statutes were unconstitutionally vague because the birds covered by the Migratory Bird Treaty Act and the golden eagles covered by the Eagle Protection Act were not clearly defined as species. They also contended that certain species had been added to the list of those protected under the Migratory Bird Treaty Act pursuant to an improper delegation of authority in the Convention between the United States and Mexico. The court did not reach either of these issues.

commercial activity in such articles (App. A, *infra*, 13a-14a). The court assumed "that there is no 'scientific method' for detecting the age of feathers," but concluded that "these statutes may be enforced by less drastic regulatory procedures, including affidavits of acquisition, registration by business records or marking, and expert examination" (App. A, *infra*, 5a).

In its judgment, the court declared the Secretary's regulations invalid and unenforceable "as against the Plaintiffs' property rights in feathers and artifacts owned before the effective date of the subject statute" and enjoined the Secretary from interfering with the exercise of those rights, "including the rights of sale, barter or exchange" (App. B, *infra*, 16a-17a).[4]

[4] Although the court's judgment may be read as applicable only to feathers and artifacts that appellees themselves owned before the effective dates of the applicable statutes, the primary thrust of the court's opinion is that sales of feathers or feathered artifacts may not be prohibited so long as the feathers came from birds lawfully taken by anyone before the critical dates. Thus, the Acts were held "not applicable to preexisting, legally-obtained bird parts or products therefrom" (App. A, *infra*, 14a; see also *ibid.*: "Although the sale of plaintiffs' pre-act feathers may not, therefore, be prohibited * * *"). On the other hand, the court stated that the Acts "apply only to birds and products therefrom which the owner acquired after the statutes were enacted" (App. A, *infra*, 13a); like the terms of the judgment, this statement might be read to limit the holding to birds and bird parts that appellees had already acquired before the critical dates.

IF THIS COURT HAS JURISDICTION, THE QUESTIONS ARE SUBSTANTIAL

We are filing this jurisdictional statement to protect the Secretary's right of appeal to this Court in the event that the Court determines that it has jurisdiction to hear this appeal under 28 U.S.C. 1253. That depends on whether the constitutional issues presented in this case required the convening of a three-judge district court under the former 28 U.S.C. (1970 ed.) 2282. As we explain below, we believe that the constitutional issues are not substantial and therefore did not require the convening of the three-judge court, so that this Court lacks jurisdiction. See *Norton* v. *Mathews*, 427 U.S. 524, 529 (1976); *Goosby* v. *Osser*, 409 U.S. 512, 518 (1973). We accordingly request the Court to make an appropriate alternative disposition of the case (see page 23, *infra*). If the Court determines that it has jurisdiction, however, we submit that the questions presented by the decision below are substantial and merit plenary review. In order to assist the Court in making the jurisdictional determination, and in order to demonstrate the substantiality of the questions presented in case the Court finds that it has jurisdiction, we will discuss the statutory and then the constitutional questions involved in the district court's decision.

1. The language of the Eagle Protection Act is clear. Section 1 of the Act, 16 U.S.C. 668, makes it illegal to "take, possess, sell, purchase, barter, * * * transport, export or import, at any time or in any manner any bald eagle * * * or any golden

eagle, alive or dead, or any part" of such an eagle, except as permitted by the Act. An exception is provided in Section 1(a) for the "possession or transportation" of any such eagles, or their parts, that were lawfully taken prior to the date they came under the Act's protection.[5] No exception is provided for the sale or purchase of eagles or parts of eagles taken before the date of protection. One can only infer that Congress intended to forbid commercial activity in pre-protection eagles and eagle parts, at least in the absence of an authorized regulation of the Secretary permitting such activity.

The Department of the Interior first published regulations expressly forbidding the buying and selling of pre-protection eagle parts in 1963. 50 C.F.R. 11.8(b) (1963), 28 Fed. Reg. 975-976 (1963). Their language was identical to that of 50 C.F.R. 22.2(a), the Eagle Protection Act regulation involved here.[6] Congress must have been aware of those regulations when it amended the Act in 1972 to increase the penalties for violations and expand the Act's coverage. Act of October 23, 1972, Pub. L. No. 92-535, 86 Stat. 1064. The legislative history of this amendment contains no indication that Congress disagreed with the Secretary's interpretation of the pre-protection pro-

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[5] Another exception is provided in Section 2, 16 U.S.C. 668a, for certain takings, possession, and uses of protected eagles for scientific, exhibition, or religious purposes, or to protect livestock or wildlife, when specifically authorized by the Secretary.

[6] The court below was in error when it implied that the current regulations were first promulgated in 1974 (App. A, *infra*, 3a).

viso. In fact, the amendment was designed to strengthen the Act because it was not adequately protecting eagles. See S. Rep. No. 92-1159, 92d Cong., 2d Sess. (1972). Whether or not Congress by the 1972 amendment implicitly approved the Secretary's interpretation (see *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974)), it in no way disapproved it. And that interpretation is not only consistent with the language of the statute but, as a longstanding interpretation by the agency charged with administration of the Act, is entitled to great weight. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *NLRB* v. *Bell Aerospace Co.*, *supra*, 416 U.S. at 274-275.

The Eagle Protection Act as interpreted by the Secretary does not represent a new approach to the protection of animal species. In other statutes Congress has likewise sought to eliminate commerce in protected animals or their parts, regardless of when the particular animals were killed, as a means of preventing the further killing of animals of that species. These statutes have been so interpreted by the courts, and they have been upheld against constitutional challenge. In *Delbay Pharmaceuticals* v. *Department of Commerce*, 409 F. Supp. 637 (D. D.C., 1976), the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*, was upheld as forbidding sale of a drug containing a substance from the sperm whale, even though the substance was obtained before the whale was protected.[7] In *United States* v. *Rich-*

[7] In 1976, Congress amended the Endangered Species Act of 1973 to permit the Secretary to make a limited exception from the requirements of the Act for sperm whale oil and

ards, No. 77-1603 (10th Cir. Aug. 23, 1978), the Migratory Bird Treaty Act was upheld as forbidding sales of certain migratory birds raised in captivity from legally possessed parents.[8] In *United States* v. *Species of Wildlife*, 404 F. Supp. 1298 (E.D.N.Y. 1975), the Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275, was upheld as providing for forfeiture of a stuffed leopard imported from Kenya, where it had been killed prior to federal protection. See also *United States* v. *Kepler*, 531 F.2d 796 (6th Cir. 1976) (Endangered Species Act of 1973 upheld as forbidding interstate commercial transportation of wildlife—leopard and cougar—captured before the Act became effective). But see *United States* v. *Aitson*, No. 74-1588 (10th Cir. July

scrimshaw products possessed in the course of commercial activity prior to December 28, 1973. Act of July 12, 1976, Pub. L. No. 94-359, 90 Stat. 911 (adding new subsections (f) and (g) to 16 U.S.C. 1539). The Amendment did not change the approach of the Act and implicitly affirmed the Secretary's power to forbid commercial sales in legally obtained pre-protection animal parts. Moreover, the addition of the new subsections (f) and (g) did not exonerate violations committed prior to the Amendment's adoption. 16 U.S.C. 1539(f)(7), Pub. L. No. 94-359, 90 Stat. 912.

[8] In the "Endangered Species Act Amendments of 1978," Congress has lifted certain prohibitions of the Endangered Species Act of 1973 against the commercial breeding of raptors (S. 2899, Section 4, 124 Cong. Rec. H12904-H12905 (daily ed. Oct. 14, 1978)). The removal of the restrictions applies to raptors legally held in captivity on the effective date of the amendments and to their progeny. The Endangered Species Act Amendments of 1978 were sent to the President on October 30, 1978.

21, 1975) (dictum, in unpublished opinion, that pre-protection acquisition of feathers or birds would be a defense to prosecution under the Migratory Bird Treaty Act).

The approach to pre-protection artifacts taken in the Eagle Protection Act is a reasonable means of promoting the Act's purpose of preventing the present-day killing of protected eagles. Shutting off the market in articles containing eagle feathers may reasonably be considered essential to that purpose, because it is practically impossible to distinguish between old feathers and new ones. Thus, in the affidavit of Dr. Allan Brush, Professor of Zoology at the University of Connecticut, filed in the court below (Exhibit 1 in support of the Secretary's motion for summary judgment, paras. 5-6), Dr. Brush states:

> I can detect no change in the composition of fresh feather material and museum material removed from the skin of birds known, by museum records, to be over 100 years of age. In other words, I know of no good test for ascertaining whether a given feather is a century old or recently taken. Decomposition in bird feathers is such a gradual process that existing scientific methods can detect no change for purposes of ascribing any particular age to feathers. Nor have scientists been able to detect morphological, color or pattern changes in feathers found in archeological digs known to be from the Seventh and Eighth Century A.D. as part of basket-weaver cultures existing in an area now known as the southwestern United States.

Because new feathers can be passed off for old ones, an incentive to kill eagles for their feathers would

persist as long as any trade in feathers or feathered artifacts was allowed.[9]

The court below accepted the premise "that there is no 'scientific method' for detecting the age of feathers," but still determined that a system of registration should be used instead of a prohibition on sales (App. A, *infra*, 5a). It would be very difficult, however, to provide for the marking and registering of old feathers or feathered artifacts in a way that would be permanent and would not be vulnerable to fraud.[10] In any event, the question of what measures to take with respect to commercial traffic in eagle feathers in order most effectively to protect living eagles is a question for Congress, and for the Secretary within the authority delegated to him by Congress. It is not a question for the district court.

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[9] The court in *Delbay Pharmaceuticals, supra*, recognized that similar considerations justified a congressional decision to prohibit trade in a substance derived from the sperm whale even if the substance was obtained before the whale was protected:

> The difficulties in enforcement that would result if trafficking in "legally imported" endangered species were allowed while contraband endangered species were to be excluded from interstate commerce, could be monumental. * * * [A] total ban is easier to enforce than a partial ban. Additionally, if there continued to be a market for "legally imported" spermaceti, it might encourage the illegal taking of sperm whales, a result contrary to the basic goal of the 1973 Act. * * * * [409 F. Supp. at 644.]

[10] See the affidavit of Loren Parcher, Deputy Chief of Law Enforcement, Fish and Wildlife Service (Exhibit 2 in support of the Secretary's motion for summary judgment).

In reading out of the Eagle Protection Act the prohibition on commercial activity in pre-protection eagle feathers, and invalidating the Secretary's regulation, the district court was enforcing its own view "of the wisdom or unwisdom of a particular course consciously selected by the Congress." *TVA* v. *Hill*, No. 76-1701 (June 15, 1978), slip op. 39. This it had no authority to do. (*ibid.*)

2. The Migratory Bird Treaty Act is similarly clear, but gives the Secretary greater discretion. Section 2 of the Act, 16 U.S.C. 703, makes it illegal to "possess, * * * sell, * * * purchase, * * * [or] transport" any bird or part of a bird protected by the relevant treaties, including "any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof," except as permitted by regulations issued by the Secretary under the Act.[11] Section 3 of the Act, 16 U.S.C. 704, sets out the Secretary's rule-making authority. It authorizes him "to determine when, to what extent, *if at all*, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, possession,

[11] The phrase, "any product, whether or not manufactured, which consists, or is composed in whole or in part, of any such bird or any part, nest, or egg thereof," was substituted for "any part, nest, or egg of any such birds" by the 1974 amendments that adapted the Act to the Convention with Japan (88 Stat. 190). The legislative history makes it clear that the change was designed only to make plain what Congress believed was already implicit in the Act. S. Rep. No. 93-851, 93d Cong., 2d Sess. 3 (1974).

sale, purchase, shipment, [etc.]" of any bird or part of a bird covered by the Act (emphasis added). This authority is nowhere restricted to illegally taken birds, though Congress did take care to foreclose the Secretary from construing the Act to apply to sales of migratory game birds bred on farms (App. D, *infra*, 24a). (See note 1, ~~*supra*~~ *infra*.)

The terms of the Act thus *prima facie* forbid, and the Secretary is authorized to adopt regulations that do not exempt, sales of protected birds or parts of birds regardless of when the birds were killed. The Secretary's regulation, 50 C.F.R. 21.2(a), exempts the possession and transportation of birds and parts of birds lawfully acquired before the date of the Act's protection, but still prohibits their purchase or sale. This prohibition is well within the Secretary's authority to adopt rules "to carry out the purposes of the conventions" (16 U.S.C. 704).[12] The Secretary's interpretation of the Migratory Bird Act, like his interpretation of the Eagle Protection Act, is consistent with the statutory language and entitled to great weight, *Udall* v. *Tallman*, *supra*. And the approach he has taken—prohibiting commercial

[12] Those purposes are, among other things, to save migratory birds "from indiscriminate slaughter" (Preamble to the 1916 Convention between Great Britain and the United States, 39 Stat. 1702, reprinted in H.R. Rep. No. 243, 65th Cong., 2d Sess. 23 (1918)), and to prevent the extinction of any species of migratory bird (Preamble to the 1936 Convention between Mexico and the United States, 50 Stat. 1311; Preamble to the 1972 Convention between Japan and the United States, March 4, 1972, 25 U.S.T. 3329-3330).

traffic in protected birds and parts of birds, whenever they may have been killed, in order to assure the protection of living birds—is a reasonable one.

In reaching its decision to invalidate the Secretary's regulation, the district court relied in part (App. A, *infra*, 5a-7a) on three early district court cases indicating that, in view of doubts about the power of Congress to provide otherwise, the Migratory Bird Treaty Act did not apply to birds taken lawfully before their species came under the Act's protection. *United States* v. *Fuld Store Co.*, 262 F. 836 (D. Mont. 1920); *In re Informations Under Migratory Bird Treaty Act*, 281 F. 546 (D. Mont. 1922); *United States* v. *Marks*, 4 F.2d 420 (S.D. Tex. 1925).[13] Whether or not these cases were correctly decided in the 1920's, they are of little significance today in the light of more modern recognition of the extent to which legislation may validly affect property rights. See, *e.g.*, *Penn Central Transportation Co.* v. *New York City*, No. 77-444 (June 26, 1978). More consistent with current law is *United States* v. *Richards*, *supra*, upholding regulations under the Migratory Bird Treaty Act that forbade the sale of protected birds raised in captivity. See also *Delbay Pharmaceuticals* v. *Department of Commerce*, *supra*; *United States* v. *Species of Wildlife*, *supra*; *United States* v. *Kepler*, *supra*; and see the discussion in point 3, *infra*.

Thus, in view of the terms of the Migratory Bird Treaty Act and the broad authority the Act gives the Secretary to determine under what circumstances, "if at all," protected birds and their parts may be traded commercially, the Secretary was authorized to adopt the regulations at issue here. The court below erred in declaring them invalid.

3. The district court was of the view that if the Eagle Protection Act and the Migratory Bird Treaty Act prohibited—or authorized the Secretary to prohibit—the sale of birds or part of birds lawfully taken prior to the enactment of legal protection, they would be unconstitutional as a taking of property without due process or just compensation (App. A, *infra*, 5a-

[13] *Fuld* involved a criminal charge of possession and offer for sale of articles made from legally taken heron feathers. The court dismissed the information, taking the view that the owners of the articles would be deprived of property without just compensation if the Act applied and that forbidding mere possession might be unconstitutional as an *ex post facto* law. The Fifth Amendment argument has no merit today (see point 3, *infra*), and the *ex post facto* argument could apply only where possession was made illegal, which is not the case here. *In re Informations* indicated that the Migratory Bird Treaty Act and its regulations were not clear enough to forbid the sale of a legally taken, pre-protection stuffed and mounted duck. In our view the Act itself is sufficiently clear, and the regulations in the preesnt case remove any possible doubt. The rationale of *Marks* is not clear. The case appears to hold that Congress lacks the power to make illegal the sale of legally taken birds because it lacks a "general police power" over migratory birds, a view that has no merit and is not pressed in the present case. The pleading requirement imposed by these cases—that the government in a criminal prosecution under the Act must allege that the birds were taken subsequent to passage of the Act—is rejected in *United States* v. *Hamel*, 534 F.2d 1354 (9th Cir. 1976); *United States* v. *Blanket*, 391 F. Supp. 15, 19 n.1 (W.D. Okla. 1975); *United States* v. *Aitson*, *supra*.

7a, 10a, 13a). We doubt that this prohibition, which applies only to commercial trade in the property in question and not to its possession, would work a constitutional "taking" even if appellees had alleged that they acquired their feathered artifacts before the species of bird from which the feathers came was placed under legal protection. *Jacob Ruppert* v. *Caffey*, 251 U.S. 264, 302-303 (1920). The prohibition of commercial traffic does not amount to a "physical invasion" of the property by the government, and it serves an important public purpose, the preservation and protection of bird species. See *Penn Central Transportation Co.* v. *New York City*, *supra*, slip op. 18-21. Accord, *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155 (1958).

But that issue is not presented in this case, for appellees have not alleged a basic element of constitutional "takings": harm to the value of property acquired with "distinct investment-backed expectations." *Penn Central Transportation Co.* v. *New York City*, *supra*, slip op. 18, 21. See also *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1920). Appellees alleged only that they owned or did business in artifacts containing feathers taken from protected birds, "which birds were obtained prior to the effective date of Federal protection of such birds" (Complaint at 2, 3, 4, 5, 6). They did not allege that they themselves had acquired the artifacts prior to the effective dates of federal protection. Thus, even assuming, *arguendo*, that the Acts or regulations brought about a taking of property in pre-protection artifacts, appellees

did not allege that any of their property was thus taken.

In any event, even if there is a taking, nothing in either of these Acts prevents an action in the Court of Claims under the Tucker Act, 28 U.S.C. 1491, for the payment of just compensation. That remedy therefore would be available to anyone who could show an actual taking. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126-127 (1974). There is, accordingly, no basis for challenging these Acts as denying just compensation (*ibid*).

There is similarly no significant argument that the statutes and regulations here constitute a taking of property "without due process," as alleged by appellees. The protection of eagles and migratory birds is a proper objective of Congress under the Commerce Clause and the treaty power, and the forbidding of commercial transactions in those birds or parts of them is a reasonable means of promoting that objective. That the forbidden activity is harmless in itself does not vitiate the Acts or regulations. The courts do not wield the Due Process Clause to strike down legislative provisions because they are not made "with mathematical nicety or because in practice [they] result in some inequality." *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911); *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970). Neither is there any merit to the suggestion of the court below, citing *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960), that the statutes and regulations could not pass constitutional muster unless they were the least restrictive measures

possible (App. B, *infra*, 12a). *Shelton* involved a statute directly touching an individual's First Amendment right of association, rather than legislation affecting property interests in order to accomplish a legitimate congressional purpose. See *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 377 (1973); *Weinberger* v. *Salfi*, 422 U.S. 749, 768-774).[14]

4. For the reasons just set forth, it is our position that appellees' constitutional claims are wholly insubstantial. If this is so, the three-judge district court should not have been convened (see *Delbay Pharmaceuticals*, *supra*, 409 F. Supp. at 646), and

[14] Neither is there merit to appellees' claims, not reached by the court below, that one or both of the Acts are unconstitutional for vagueness in describing the protected birds. See page 6, note 3, *supra*. To withstand a vagueness challenge, a statute or regulation need only advise a person of common intelligence of what behavior is prohibited. *Colten* v. *Kentucky*, 407 U.S. 104, 110 (1972). That requirement is met here. The identity of the eagles protected under the Eagle Protection Act is clear. Nor can there be significant doubt concerning the birds protected by the Migratory Bird Treaty Act. (See the list of protected birds set out at 50 C.F.R. 10.13.) Appellees do not now claim that there is any doubt concerning the protected status of the birds from which the feathers in their artifacts were taken. (This claim, although made in the complaint, was not advanced in appellees' summary judgment motions.)

Appellees' argument that the list of birds to be protected under the Migratory Bird Treaty Act may not be determined by international executive agreement because such action constitutes an unlawful delegation of congressional power to the executive is also without merit. Treaties may validly provide for subsequent binding agreements between the Executive Branch of the government and other nations. See 14 M. Whiteman, *Digest of International Law* 216-233 (1970).

this Court lacks jurisdiction to entertain this appeal. *Goosby* v. ~~*United States*~~ Osser, 409 U.S. 512, 518 (1973); *Norton* v. *Mathews*, 427 U.S. 524, 529 (1976). Accordingly, the Secretary has filed a notice of appeal to the United States Court of Appeals for the Tenth Circuit. The Secretary also filed a notice of appeal to this Court, and is filing this jurisdictional statement, to protect his right of appeal to this Court in the event that the constitutional claims are deemed substantial. Cf. *Turner* v. *City of Memphis*, 369 U.S. 350, 352 (1962).

The notice of appeal to the Tenth Circuit was filed one day out of time, for reasons that we believe constitute excusable neglect under Rule 4(a) of the Federal Rules of Appellate Procedure.[15] The Secretary therefore moved the district court pursuant to Rule 4(a) for an extension of time in which to file the notice of appeal. On September 12, 1978, the court denied this motion, on the ground that a significant constitutional question had been presented in the case and appeal therefore did not properly lie to the court of appeals. The order of the district court stated in part (App. E, *infra*, 28a-29a): "[T]he request is denied for the reason that we do not think that the case is one subject to appeal to the court of appeals, and we do not wish to give tacit approval

[15] The Assistant United States Attorney who was to file the notice of appeal on Monday, August 7, 1978, the last day on which the notice could be filed without an extension, was injured during the preceding weekend, and spent that Monday in a hospital. As a result the notice of appeal was not filed until Tuesday, August 8.

to an appeal which suggests the lack of a substantial constitutional question."

In a situation such as this, where (if we are correct) a three-judge district court has been improperly convened, and where an appeal has been taken to this Court, the Court has jurisdiction to vacate the judgment of the district court and remand the case for the entry of a fresh judgment from which an appeal may be taken to the court of appeals. *Norton* v. *Mathews*, *supra*, 427 U.S. at 531; *Gonzalez* v. *Employees Credit Union*, 419 U.S. 90, 101 (1974). In view of the insubstantial nature of the constitutional claims raised by appellees, we believe that would be the proper course here.

CONCLUSION

The Court should vacate the judgment of the district court and remand the case to that court for the entry of a fresh judgment from which an appeal may be taken to the United States Court of Appeals for the Tenth Circuit. If the Court takes the view that the three-judge district court was properly convened, probable jurisdiction should be noted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

ELINOR HADLEY STILLMAN
Assistant to the Solicitor General

ROBERT L. KLARQUIST
EDWARD J. SHAWAKER
Attorneys

NOVEMBER 1978

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 75 W 1000

L. DOUGLAS ALLARD and CAROL S. ALLARD; PIERRE G. BOVIS and SYLVIA BOVIS; DENIS C. EROS; ALEXANDER G. KELLEY; and ROBERT G. WARD, PLAINTIFFS

v.

CECIL D. ANDRUS, Secretary of the Interior; ROBERT HERBST, Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior; LYNN GREENWALT, Director of the United States Fish and Wildlife Service, Department of the Interior; and HARVEY WILLOUGHBY, Regional Director of Region 6, United States Fish and Wildlife Service, Department of the Interior, DEFENDANTS

Mr. John P. Akolt, III, Akolt, Dick & Akolt, 1510 Lincoln Center Building, 1660 Lincoln Street, Denver, Colorado 80203, attorney for the plaintiffs.

Mr. Joseph F. Dolan, United States Attorney, and Mr. James W. Winchester, Assistant United States Attorney, C-330 United States Courthouse, Denver, Colorado 80294, attorneys for the defendants.

MEMORANDUM OPINION AND ORDER

Before BARRETT, Circuit Judge, WINNER, Chief District Judge, and MATSCH, District Judge.

MATSCH, District Judge

The plaintiffs are owners of, dealers in, and appraisers of American Indian artifacts which include the feathers of various birds. These artifacts all existed before the enactment of federal laws which protect the species of birds whose feathers were used in creating the artifacts. Two of the plaintiffs have been prosecuted for the sale or offering for sale of such preexisting artifacts.

The defendants are responsible for enforcing the Migratory Bird Treaty Act, 16 U.S.C. § 703, *et seq.*, the Eagle Protection Act, 16 U.S.C. § 668, *et seq.*, and the regulations issued thereunder, which prohibit, *inter alia*, the sale of birds or parts of birds which are protected by these statutes. The enforcement policy followed by the defendants is to prohibit commercial activity involving parts of protected birds regardless of the date the parts were obtained. Plaintiffs contend that the defendants' application of these statutes and regulations to preexisting artifacts restricts their ability to engage in a lawful occupation and destroys a valuable property right, all in violation of the constitutional guaranty of due process. On this basis, they have sought declaratory and injunctive relief.

Jurisdiction is provided by 28 U.S.C. § 1331. A three-judge court was convened under 28 U.S.C. §§ 2282, 2284, because this complaint was filed before August 12, 1976. The case is ready for final disposition on cross motions for summary judgment.

The Migratory Bird Treaty Act was passed in 1918

and amended in 1936 and 1974. This statute makes it unlawful to hunt, capture, kill, possess, sell or transport any migratory bird, part, or product including birds or their parts, of any species protected by conventions between the United States and foreign countries. 16 U.S.C. § 703. Neither the original Act nor the amendments make any express reference to birds or parts of birds lawfully taken and possessed before the effective date of the protective legislation.

The United States Fish and Wildlife Service of the Department of the Interior is responsible for the enforcement and administration of the Migratory Bird Treaty Act. In 1974, the Fish and Wildlife Service issued the following regulation:

> Migratory birds, their parts, nests, or eggs, lawfully acquired prior to the effective date of Federal protection under the Migratory Bird Treaty Act (16 U.S.C. 703-711) may be possessed or transported without a Federal permit, but may not be imported, exported, purchased, sold, bartered, or offered for purchase, sale, trade, or barter, and all shipments of such birds must be marked as provided by 18 U.S.C. § 44 and § 14.81 of this subchapter: *Provided*, That no exemption from any statute or regulation shall accrue to any offspring of such birds.

50 C.F.R. § 21.2(a). The validity of this regulation prohibiting the sale of bird parts acquired by the owner before the effective date of the Act is in issue in this case.

The Eagle Protection Act was enacted in 1940 and amended in 1959, 1962 and 1972. Originally it pro-

tected the bald eagle with the same prohibitions as those in the Migratory Bird Treaty Act. Unlike that statute however, the Eagle Protection Act expressly permits the possession and transportation of eagles and eagle parts lawfully taken prior to its effective date. 16 U.S.C. § 668. The 1962 Amendment extended protection to the golden eagle. Nothing in the Act itself or the amendments mentions the *sale* of pre-act eagle parts.

In 1974, a regulation prohibiting the sale of eagle parts while continuing to permit their possession and transportation was adopted. 50 C.F.R. § 22.2. That regulation has also been challenged in this case.

Plaintiffs claim that these two statutes could not have been intended to apply to existing native art, and that to extend them by the challenged regulations results in a denial of property rights without due process of law and is not required to achieve the apparent purpose of protecting living birds.

The defendants contend that it is impossible to distinguish feathers by age, that living birds are protected by eliminating any market for dead birds, that the Eagle Protection Act explicitly permitted only the possession and transportation of preexisting bird parts and, inferentially, prohibited their sale, and that the statutes are not retrospective in their application because the plaintiffs must do something subsequent to the enactment date to violate them.

The application of these acts to the plaintiffs' artifacts has a destructive and confiscatory effect on preexisting property rights in these items. The questioned regulations have destroyed the right to sell them. Assuming that there is no "scientific method" for detecting the age of feathers, these statutes may be enforced by less drastic regulatory procedures, including affidavits of acquisition, registration by business records or marking, and expert examination. The defendants have failed to show any efforts to establish such a registration system.

It has long been recognized that in the absence of a legislative prohibition, the capture of birds creates a property right in them. *Shouse* v. *Moore*, 11 F. Supp. 784 (E.D. Ky. 1935). The feathers of such legally captured birds may be converted into aigrettes or other ornaments, and in such "harmless, useful, and valuable property there is a vested right of possession, use, enjoyment, and sale—a liberty of action, of which owners cannot be arbitrarily deprived without compensation." *United States* v. *Fuld Store Co.*, 262 F. 836, 837 (D. Mont. 1920).

The protection of such property rights in legally taken birds or feathers and the items produced with them is precisely what caused federal courts on three different occasions to deny applicability of the Migratory Bird Treaty Act to birds or parts lawfully taken prior to its enactment. In *United States* v. *Fuld Store Co.*, *supra*, a two count information, charging the defendant with possession of and offering for sale aigrettes of heron feathers which it had legally owned before the Migratory Bird Treaty Act was passed, was dismissed for failure to state a crime. The court found that to rule otherwise would result

in depriving the defendant of pre-existing property rights to which its ownership of the articles entitled it:

> Before the act, herons were lawfully killed and their plumage lawfully possessed and sold. Much of this plumage had been converted into aigrettes, artistic, beautiful, useful, and ornamental —harmless and valuable. They had entered into the domain of commerce, and the stock of private property, and were possessed by many persons. An intent on the part of Congress to virtually outlaw and destroy such property ought not to be assumed, unless very clear and the only reasonable construction of the act; for it is very doubtful if Congress has any such power.
>
> . . . [S]uch construction, denouncing as a crime possession and sale of this theretofore lawful private property, would expose the act to serious question as an ex post facto law within constitutional inhibition. . . . All this can be avoided by construction that the act relates only to birds and parts of birds killed subsequent to the act, a permissible and more reasonable construction and in principle always to be preferred to avoid grave doubts of the validity of the law otherwise. (262 F. at 837-38)

Within five years of *Fuld*, two other federal cases were decided upon the same reasoning. *In re Informations Under Migratory Bird Treaty Act*, 281 F. 546 (D. Mont. 1922); *United States* v. *Marks*, 4 F.2d 420 (S.D. Tex. 1925).

The defendants seek to avoid these decisions by arguing that they were "either wrongly decided or have

been overruled by the expansion of the interstate commerce power of the federal government." While it is true that the national government has extended its regulation of interstate commerce, the protection of private property by the due process clause of the Fifth Amendment to the United States Constitution is still very much intact and it must be assumed that the Congress remains respectful of it.

Two other cases offer persuasive authority for not applying these statutes to preexisting artifacts and should briefly be mentioned. In an unpublished opinion in 1975, the Court of Appeals, Tenth Circuit, said that a defendant in a criminal case charging a violation of the Migratory Bird Treaty Act could assert and attempt to prove, as a defense, that the feathers or birds were acquired before the statute. *United States* v. *Aitson* (No. 74-1588, July 21, 1975).

Considering legislation almost identical to the Migratory Bird Treaty Act, the New York Court of Appeals in *A. E. Nettleton Co.* v. *Diamond*, 315 N.Y. Supp.2d 625, 264 N.E.2d 118 (1970), appeal dismissed, 401 U.S. 969 (1971), held that the New York Mason Act did not apply to skins, hides or products therefrom acquired in this country prior to the effective date of the Act, providing that their receipt could be properly documented by U. S. Customs records or authentic inventory or shipment records.

The defendants have cited *Delbay Pharmaceuticals* v. *Department of Commerce*, 409 F. Supp. 637 (D.

D.C. 1976), interpreting the Endangered Species Act of 1973, 16 U.S.C. § 1531 *et seq.*, to prohibit the sale of animal parts legally held prior to the enactment date. There the plaintiff manufactured a prescription drug called Lotrimin, containing spermaceti, a waxy substance derived from the sperm whale. Plaintiff challenged the seizure of his inventory of spermaceti, including all Lotrimin containing spermaceti, on the ground that it was legally brought into the United States before the enactment of the 1973 Act. Upholding the seizure, the district judge said that the Act's strong enforcement policy required shutting off any interstate market for spermaceti which could encourage the illegal taking of sperm whales.

The conclusion in *Delbay* was based on a finding "that Congress intended to extend the prohibitions of the 1973 Act to their widest possible reach." 409 F. Supp. at 642. Congress' intent in this regard was no doubt based on a concern for protecting wildlife whose very existence is threatened. As evidence of this desire to restrict the taking of these animals "in the broadest possible terms," see H.R. Rep. No. 412, 93d Cong., 1st Sess. at 15, the Act provides that even an unlisted species may be treated as an endangered species if the resemblance between the two is so close such that "enforcement personnel would have substantial difficulty in attempting to differentiate between the listed and unlisted species." 16 U.S.C. § 1533(e).

Unlike the Endangered Species Act, the statutes in question here include game birds, which plaintiffs point out are legally killed in great numbers each year, and also include such birds as grackles and blackbirds, which the Department of the Interior itself has killed by the millions to protect livestock and agriculture in the southeastern United States. See Public Law 94-207, 94th Cong., February 4, 1976. Furthermore, there is no indication in the Migratory Bird Treaty Act, the Eagle Protection Act, or the legislative history that Congress intended these statutes to be enforced "in the broadest possible terms." Thus, *Delbay*'s heavy reliance on Congress' reaction to the practical circumstances presented by endangered and threatened species is a basis for distinguishing the holding in that case from the issue presented here.

It is unnecessary for us to distinguish the court's treatment in *Delbay* of the due process claim raised in that case. It is worth noting, however, that in dismissing the plaintiff's Fifth Amendment claims, Judge Gasch stated that the Supreme Court has consistently upheld the power of Congress "to exclude from the channels of interstate commerce those products whose movements between the states the Congress deems harmful to the national welfare." (409 F. Supp. at 644) From our review of the cases, this is an accurate statement with respect to statutory prohibitions which "exclude" property from moving in commerce in the sense of limiting its beneficial *use*, e.g., *Reid* v. *Colorado*, 187 U.S. 137 (1902)

[upholding Colorado's law prohibiting the introduction of diseased livestock into the state without first complying with certain quarantine protection measures], or with respect to laws which prohibit the transportation in interstate commerce of articles which are themselves considered injurious to the public, e.g., *Lottery Case*, 188 U.S. 321 (1902) [affirming Congress' power to prohibit the interstate carriage of lottery tickets], or laws which restrict the interstate shipment of articles which, though harmless and useful in themselves, were produced under conditions which are injurious to the public, e.g., *United States* v. *Darby*, 312 U.S. 100 (1940) [prohibition of the shipment of lumber produced under substandard labor conditions held within constitutional authority of Congress]. We would submit, however, that the Supreme Court has never upheld the power of Congress to deprive a person forever of the right to dispose of his private property through commercial channels where such property was legally acquired—in contravention of no public policy—and where the property is not only harmless in itself, but also has intrinsic value.

The *Delbay* decision was never appealed. Shortly after it, the Department of Commerce returned the seized material to Delbay and Congress passed an Amendment to the Endangered Species Act, the purpose of which was "to allow for the limited disposal of pre-Act, legally-obtained endangered species parts and products." H.R. Rep. No. 94-823, 94th Cong., 2d Sess. 3 (1976), U.S. Code Cong. & Admin. News,

p. 1686. In view of what Congress deemed "a severe economic hardship . . . inflicted upon those individuals who were engaged in legitimate commercial activities and who were holding large inventories prior to the passage of the Act," *Id.* at 1686-87, this amendment provided a three-year exemption allowing pre-act scrimshaw and sperm whale oil (which includes spermaceti) to be sold commercially. Public Law 94-359, July 12, 1976. The legislative history of this amendment shows that the Secretary of the Interior, a defendant in this case, fully supported these exemptions and considered it a matter of "great concern [that] individuals legally possessed, prior to enactment of the 1973 Act, parts or products of endangered species for the purpose of sale or for other activities of a commercial nature." Letter from Nathaniel Reed to Carl B. Albert, Sept. 30, 1975, reprinted in H.R. Rep. No. 94-823, 94th Cong., 2d Sess. 8 (1976), U.S. Code Cong. & Admin. News 1976, p. 1691.

Similar wildlife legislation has also recognized the need for protecting preexisting property rights in the products of protected animals. Regulations issued pursuant to the Marine Mammal Protection Act, 16 U.S.C. § 1361 *et seq.*, exempt from the Act's coverage parts and products of marine mammals taken pre-act:

> *Exempted marine mammals or marine mammal products.*
>
> (a) The provisions of the Act and these regulations shall not apply:

(1) To any marine mammal taken before December 21, 1972, or

(2) To any marine mammal product if the marine mammal portion of such product consists solely of a marine mammal taken before such date.

50 C.F.R. § 18.25. To further these exemptions, 50 C.F.R. § 18.14 provides for a registration process so that legitimately taken marine mammal items can be distinguished from those which are illegal. We believe that such a process is an appropriate procedure for balancing the Congressional intent of preserving wildlife with due regard for the vested property rights of individuals. The Constitution would also seem to require it. *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

These precedents favor a construction of these acts which would permit the plaintiffs to sell their pre-existing artifacts. No case has ever held that either the Migratory Bird Treaty Act or the Eagle Protection Act apply to property which includes parts of protected birds lawfully existing prior to the enactment dates. There is no indication of any legislative intention that either statute should be so applied. In none of the amendments to these statutes did Congress choose to include pre-act birds or products within the proscriptive terms, despite the existing judicial constructions that the acts applied only to birds and parts thereof taken after Federal protection. We must assume that Congress was acquainted with these cases when the amendments were passed, and

either concurred with them, or decided that a retrospective application of these laws would not be permissible under the Constitution.

We are also mindful of the canon of statutory construction that when a statute is ambiguous, "construction should go in the direction of constitutional policy." *United States* v. *Johnson*, 323 U.S. 273, 276 (1944). There are grave doubts whether these two acts would be constitutional if they were construed to apply to pre-act bird products. In such a case, "[w]hen one admissible construction will preserve a statute from unconstitutionality and another will condemn it, the former is favored even if language, . . . and arguably the legislative history point somewhat more strongly in another way." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974), quoting 384 F. Supp. 895, 944 (Special Court, 1974). In short, as stated by Mr. Chief Justice Hughes, "if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson*, 285 U.S. 22, 62 (1931).

After reviewing the materials in this case, we are of the opinion that interpreting the Migratory Bird Treaty Act and the Eagle Protection Act to apply only to birds and products therefrom which the owner acquired after the statutes were enacted, is not only a "fairly possible" construction of the acts, but the only possible one.

Having decided that the prohibitions in these acts against commercial activity involving parts of protected birds are not applicable to preexisting, legally-obtained bird parts or products therefrom, we must declare the interpretive regulations, 50 C.F.R. §§ 21.2 (a) and 22.2(a), void as unauthorized extensions of the Migratory Bird Treaty Act and the Eagle Protection Act and violative of the plaintiffs' Fifth Amendment property rights.

Although the sale of plaintiffs' pre-act feathers may not, therefore, be prohibited, the agency may adopt reasonable means for the purpose of identifying and distinguishing pre-act feathers from those of illegally taken birds. An exemption and registration plan similar to those established under other wildlife conservation statutes, discussed *supra*, is an obvious possibility.

Accordingly, it is

ORDERED, that the Clerk of this Court shall enter judgment for the plaintiffs declaring the subject regulations to be invalid and unenforceable as against the plaintiffs' property rights in feathers and artifacts owned before the effective date of the subject statute and enjoining the defendants from any interference with the exercise of such rights, including the rights of sale, barter or exchange.

DATED: June 7, 1978.

BY THE COURT

/s/ James E. Barrett
JAMES E. BARRETT
United States Circuit Judge

/s/ Fred M. Winner
FRED M. WINNER
United States District Judge

/s/ Richard P. Matsch
RICHARD P. MATSCH
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 75-W-1000

L. DOUGLAS ALLARD and CAROL S. ALLARD; PIERRE G. BOVIS and SYLVIA BOVIS; DENIS C. EROS; ALEXANDER G. KELLEY; and ROBERT G. WARD, PLAINTIFFS

vs.

CECIL D. ANDRUS, Secretary of the Interior; ROBERT HERBST, Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior; LYNN GREENWALT, Director of the United States Fish and Wildlife Service, Department of the Interior; and HARVEY WILLOUGHBY, Regional Director of Region 6, United States Fish and Wildlife Service, Department of the Interior, DEFENDANTS

JUDGMENT

Pursuant to and in accordance with the Memorandum Opinion and Order signed by the Honorable James E. Barrett, Circuit Judge, United States Court of Appeals for the Tenth Circuit; the Honorable Fred M. Winner, United States District Judge, and the Honorable Richard P. Matsch, United States District Judge, on June 7, 1978, it is

ORDERED AND ADJUDGED that judgment is entered for the Plaintiffs declaring the subject regulations to be invalid and unenforceable as against

the Plaintiffs' property rights in feathers and artifacts owned before the effective date of the subject statute and Defendants are enjoined from any interference with the exercise of such rights, including the rights of sale, barter or exchange.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff shall recover their costs upon filing a Bill of Costs with the Clerk of the Court within 10 days from date of entry of Judgment.

Dated at Denver, Colorado, this 7th day of June, 1978.

/s/ James R. Manspeaker
JAMES R. MANSPEAKER
Clerk
United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 75-W-1000

L. DOUGLAS ALLARD and CAROL S. ALLARD; PIERRE G. BOVIS and SYLVIA BOVIS; DENIS C. EROS; ALEXANDER G. KELLEY; and ROBERT G. WARD, PLAINTIFFS

v.

CECIL D. ANDRUS, Secretary of the Interior; ROBERT HERBST, Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior; LYNN GREENWALT, Director of the United States Fish and Wildlife Service, Department of the Interior; and HARVEY WILLOUGHBY, Regional Director of Region 6, United States Fish and Wildlife Service, Department of the Interior, DEFENDANTS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Cecil D. Andrus, Secretary of the Interior; Robert Herbst, Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior; Lynn Greenwalt, Director of the United States Fish and Wildlife Service, Department of the Interior; and Harvey Willoughby, Regional Director of Region 6, United States Fish and Wildlife Service, Department of the Interior, the defendants above-named, hereby appeal to the Supreme

Court of the United States from the final judgment entered in this action on June 7, 1978.

This appeal is taken pursuant to Title 28, United States Code, Section 1253.

Dated July 5, 1978.

Respectfully submitted,

JOSEPH F. DOLAN
United States Attorney

/s/ James W. Winchester
JAMES W. WINCHESTER
Assistant U. S. Attorney

C-330 U. S. Court House
Drawer 3615
Denver, Colorado 80294
937-2065

CERTIFICATE OF SERVICE

This is to certify that a copy of the above and foregoing Notice of Appeal to the Supreme Court of the United States was served upon John P. Akolt, III, Akolt, Dick and Akolt, 1510 Lincoln Center Building, Denver, Colorado, 80203, this the 5th day of July, 1978.

/s/ Sandra L. Rogers
U. S. Attorney's Office

APPENDIX D

Section 1 of the Eagle Protection Act, as amended, 16 U.S.C. 668, provides in pertinent part:

(a) Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as provided in this subchapter, shall knowingly, or with wanton disregard for the consequences of his act take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner any bald eagle commonly known as the American eagle or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this subchapter, shall be fined not more than $5,000 or imprisoned not more than one year or both: *Provided*, that in the case of a second or subsequent conviction for a violation of this section committed after October 23, 1972, such person shall be fined not more than $10,000 or imprisoned not more than two years, or both: *Provided further*, That the commission of each taking or other act prohibited by this section with respect to a bald or golden eagle shall constitute a separate violation of this section: *Provided further*, That one-half of any such fine, but not to exceed $2,500, shall be paid to the person of persons giving information which leads to conviction: *Provided further*, That nothing herein shall be construed to prohibit possession or transportation of any bald eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to June 8, 1940, and that nothing herein shall

be construed to prohibit possession or transportation of any golden eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to the addition to this subchapter of the provisions relating to preservation of the golden eagle [October 24, 1962].

(b) Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as provided in this subchapter, shall take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle, commonly known as the American eagle, or any golden eagle, alive or dead, or any part nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this subchapter, may be assessed a civil penalty by the Secretary of not more than $5,000 for each such violation. Each violation shall be a separate offense. No penalty shall be assessed unless such person is given notice and opportunity for a hearing with respect to such violation. In determining the amount of the penalty, the gravity of the violation, and the demonstrated good faith of the person charged shall be considered by the Secretary. For good cause shown, the Secretary may remit or mitigate any such penalty. Upon any failure to pay the penalty assessed under this section, the Secretary may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found or resides or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action.

In hearing any such action, the court must sustain the Secretary's action if supported by substantial evidence.

Section 2 of the Eagle Protection Act, as amended, 16 U.S.C. 668a, provides:

> Whenever, after investigation, the Secretary of the Interior shall determine that it is compatible with the preservation of the bald eagle or the golden eagle to permit the taking, possession, and transportation of specimens thereof for the scientific or exhibition purposes of public museums, scientific societies, and zoological parks, or for the religious purposes of Indian tribes, or that it is necessary to permit the taking of such eagles for the protection of wildlife or of agricultural or other interests in any particular locality, he may authorize the taking of such eagles pursuant to regulations which he is hereby authorized to prescribe: *Provided*, That on request of the Governor of any State, the Secretary of the Interior shall authorize the taking of golden eagles for the purpose of seasonally protecting domesticated flocks and herds in such State, in accordance with regulations established under the provisions of this section, in such part or parts of such State and for such periods as the Secretary determines to be necessary to protect such interests: *Provided further*, That bald eagles may not be taken for any purpose unless, prior to such taking, a permit to do so is procured from the Secretary of the Interior: *Provided further*, That the Secretary of the Interior, pursuant to such regulations as he may prescribe, may permit the taking, possession, and transportation of golden eagles for the purposes of falconry, except that only golden eagles which would be taken because of depredations on livestock or wildlife may be taken for purposes of falconry.

Section 2 of the Migratory Bird Treaty Act, as amended, 16 U.S.C. 703, provides:

> Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or eggs of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, and the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment concluded March 4, 1972.

Section 3 of the Migratory Bird Treaty Act, as amended, 16 U.S.C. 704, provides:

> Subject to the provisions and in order to carry out the purposes of the conventions, referred to in section 703 of this title, the Secretary of the Interior is authorized and directed, from time to time, having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds, to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof, and to adopt suitable regulations permitting and governing the same, in accordance with such determinations, which regulations shall become effective when approved by the President.

Section 12 of the Migratory Bird Treaty Act, as amended, 16 U.S.C. 711, provides:

> Nothing in this subchapter shall be construed to prevent the breeding of migratory game birds on farms and preserves and the sale of birds so bred under proper regulation for the purpose of increasing the food supply.

50 C.F.R. 22.2(a) provides:

> Bald eagles, alive or dead, or their parts, nests, or eggs lawfully acquired prior to June 8, 1940, and golden eagles, alive or dead, or their parts, nests, or eggs lawfully acquired prior to October 24, 1962, may be possessed, or transported without a Federal permit, but may not be imported, exported, purchased, sold, traded, bartered, or offered for purchase, sale, trade or barter; and all shipments containing such birds, parts, nests, or eggs must be marked as provided by 18 U.S.C. 44 and § 14.81 of this Subchapter: *Provided*, That no exemption from any statute or regulations shall accrue to any offspring of such birds.

50 C.F.R. 21.2(a) provides:

> Migratory birds, their parts, nests, or eggs, lawfully acquired prior to the effective date of Federal protection under the Migratory Bird Treaty Act (16 U.S.C. 703-711) may be possessed or transported without a Federal permit, but may not be imported, exported, purchased, sold, bartered, or offered for purchase, sale, trade, or barter, and all shipments of such birds must be marked as provided by 18 U.S.C. 44 and § 14.81 of this subchapter: *Provided*, That no exemption from any statute or regulation shall accrue to any offspring of such birds.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 75-W-1000

L. DOUGLAS ALLARD and CAROL S. ALLARD; PIERRE G. BOVIS and SYLVIA BOVIS; DENIS C. EROS; ALEXANDER G. KELLEY; and ROBERT G. WARD, PLAINTIFFS

v.

CECIL D. ANDRUS, Secretary of the Interior; ROBERT HERBST, Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior; LYNN GREENWALT, Director of the United States Fish and Wildlife Service, Department of the Interior; and HARVEY WILLOUGHBY, Regional Director of Region 6, United States Fish and Wildlife Service, Department of the Interior, DEFENDANTS

NOTICE OF APPEAL

Notice is hereby given that Cecil D. Andrus, Secretary of the Interior; Robert Herbst, Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior; Lynn Greenwalt, Director of the United States Fish and Wildlife Service, Department of the Interior; and Harvey Willoughby, Regional Director of Region 6, United States Fish and Wildlife Service, Department of the Interior, the defendants abovenamed, hereby appeal to the United States Court of Appeals for the Tenth Circuit from the final judgment entered in this action on June 7, 1978.

Respectfully submitted,

JOSEPH F. DOLAN
United States Attorney

/s/ James W. Winchester
JAMES W. WINCHESTER
Assistant U. S. Attorney

C-330 U. S. Court House
Drawer 3615
Denver, Colorado 80294
837-2065

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of August, 1978, a copy of the foregoing Notice of Appeal was deposited, postage prepaid, in the U.S. Mail to AKOLT, DICK & AKOLT, John P. Akolt, III, 1510 Lincoln Center Building, Denver, Colorado 80203.

/s/ Elizabeth K. Nelson
U. S. Attorney's Office

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 75-W-1000

L. DOUGLAS ALLARD, ET AL., PLAINTIFFS

v.

CECIL D. ANDRUS, Secretary of the Interior, ET AL., DEFENDANTS

ORDER

Defendants have filed a notice of appeal to the United States Supreme Court seeking review of the decision of the Three-Judge Court which heard this case. Now defendants have asked that I, acting as a single Judge, grant an extension of time to appeal the case to the United States Court of Appeals for the Tenth Circuit. I have submitted this request to the other two Judges on the Three-Judge Court, and all of us are in agreement that no such extension should be granted by me, acting as a single Judge, or by all of us, acting as a Three-Judge Court. We think that the case did involve a substantial constitutional question to be determined by a Three-Judge Court. That being so, no appeal lies to the Court of Appeals, and, speaking for all of the Judges on the Three-Judge Court, the request for an extension of time to appeal to the Court of Appeals is denied. The request is denied for the reason that we do not

think that the case is one subject to appeal to the Court of Appeals, and we do not wish to give tacit approval to an appeal which suggests the lack of a substantial constitutional question.

DATED at Denver, Colorado, this 12 day of September, 1978.

/s/ Fred M. Winner
FRED M. WINNER
Chief Judge
United States District Court

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 276534 176

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-740

CECIL D. ANDRUS, ET AL.,

Appellants

—*v.*—

L. DOUGLAS ALLARD, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

JURISDICTIONAL STATEMENT FILED NOVEMBER 21, 1978
PROBABLE JURISDICTION NOTED FEBRUARY 21, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-740

CECIL D. ANDRUS, ET AL.,

Appellants

—*v.*—

L. DOUGLAS ALLARD, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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L. DOUGLAS ALLARD and CAROL S. ALLARD; PIERRE G. BOVIS and SYLVIA BOVIS; DENIS C. EROS; ALEXANDER G. KELLEY; and ROBERT G. WARD, PLAINTIFFS

v.

CECIL D. ANDRUS, Secretary of Interior; ROBERT HERBST, Assistant Secretary of the United States Fish and Wildlife Service, Department of the Interior; LYNN GREENWALT, Director of the United States Fish and Wildlife Service, Department of the Interior; and HARVEY WILLOUGHBY, Regional Director of Region 6, United States Fish and Wildlife Service, Department of the Interior

CAUSE

Complaint to determine Constitutionality of Eagle Protection Act (16 USC § 668-668b) and Migratory Bird Treaty Act (16 USC § 703-711)

ATTORNEYS

AKOLT, DICK & AKOLT
John P. Akolt, III
1510 Lincoln Center Bldg.
1660 Lincoln St.
Denver, CO 80203
892-5664

James W. Winchester, AUSA
Edward Shawaker
Appellate Section
LANDS & NATURAL RESOURCES DIVISION
Room 2339
DEPARTMENT OF JUSTICE
Washington, D.C. 20530

DATE	PROCEEDINGS
1975	
9/19	COMPLAINT—pd Summons Issued Notification of Claim of Unconstitutionality
9/24	Sgd (DTL, Chief Judge U.S.C./A., 10th Circuit) ORDER appointing 3/J Court to consist of McWilliams, Winner & Matsch . . . eod 9/26/75
9/26	Ltr to counsel from clerk re 3/J court
10/23	Transmittal letter from FMW to DTL, Chief Jdg
11/6	Marshal's Return on S & C . . . service on USA dfdts 9/23/75; Dr. Charles M. Loveless 9/29/75
11/24	ANSWER OF Dfdts . . . C.O.S.
1976	
1/20	MOTION of National Audubon Society, Inc. & the Environmental Defense Fund, Inc. to Intervene as Dfdts TENDERED INTERVENORS' ANSWER Certificate of Service of Motion & Tendered Answer
1/23	Certificate of Service of Dfdt's first interrogs
1/26	Memorandum of Points and authorities in support of Motion of National Audubon Society, Inc. & Environmnetal defense Fund, Inc., to intervene as Dfdts . . . with attachments . . . C.O.S.
1/29	Dfdt's Memorandum in Support of the Motion for Intervention by the National Audubon Society & the Environmental Defense Fund . . . with attachments . . . C.O.M.
1/30	Pltf's Objection to Motion to intervene as Dfdt filed by National Audubon Society, Inc. & Environmental Defense Fund, Inc., Applicants . . . C.O.M. Brief in support of above objection . . . C.O.M.
2/4	Reply Memorandum in support of Motion of National Audubon Soc. Inc. & Environmental Defense Fund, Inc. to Intervene as dfdts . . . C.O.S.

DATE	PROCEEDINGS
2/9	Sgd (RHMcW: FMW: RPM) ORDER . . . Motion of National Audubon Society & Environmental Defense Fund to Intervene is DENIED . . . C.O.S. . . . ed. 2/9/76
2/3	MOTION by National Audubon Society, Inc. & Environmental Defense Fund, Inc. for reconsideration or reargument of intervention . . . C.O.S.
2/10	Dfdt's Response to Movants' Motion for reconsideration or reargument
3/3	Certificate of Service of Plt's Req. for Admis, First Set Certificate of Service of Pltf's interrogs of Dfdts, First Set Pltf's Reply to Motion for Reconsideration or reargument filed by National Audubon Society, Inc. & Environmental Defense Fund, Inc. . . . C.O.M.
3/26	Sgd (RHMcW; FMW; RPM) ORDER . . . Motion for reconsideration or reargument is DENIED . . . C.O.M. . . . eod 3/26/76
4/2	NOTICE of Appeal by Movants for Intervention of Order of 2/9/76—Due 5/12/76—Conf. 4/15/76—9:00 a.m., Served 4/8/76. Bond on Appeal Designation of Contents of Record on Appeal . . . Cert. of Service. Copy of letter on file: Case docketed—C/A #76-1251.
4/13	Certificate of Service of Answers to Interrogs, First set & dfdt's Response to Req. for Admis. First Set
4/15	Objections to Pltf interrogs, First set. . . . C.O.S. Objections by Defts to pltf's Request for Admissions, first set . . . C.O.S.
4/22	Certificate of Conference re: Rule 6 . . . C.O.M.
4/22	MOTION of Pltf for Order to compel Answers to interrogs and answers to Request for admissions and memorandum brief in support . . . C.O.M.

DATE	PROCEEDINGS

4/30 MOTION of Dfdts for Partial Summary Judgment . . . C.O.S.
MOTION of Dfdts to Stay Discovery Proceedings . . . C.O.S.

5/10 Amended MOTION for Partial Summary Judgment or to Dismiss by Dfdts . . . C.O.M.
Affidavit of Loren Keith Parcher
Memorandum in Support of dfdts' Motion to dismiss or for partial summary judgment . . . C.O.S.

5/12 Receipt Court of Appeals for Volume I of the Record on Appeal.

5/13 NOTICE OF HEARING (FMW) 3 Judge . . . all pending motions set 9 a.m. 8/23/76 . . . C.O.M. . . . eod 5/14/76

5/19 Pltf's Memorandum in Opposition to Dfdt's Motion for partial Summary Judgment & Amended Motion for partial Summary Judgment or to dismiss . . . with attachments . . . C.O.S.

5/24 Dfdt's Reply in Support of Motion for Partial Summary Judgment . . . C.O.S.

5/25 MOTION of Pltfs for Substitution of parties . . . Thomas S. Kleppe, Sec. of the Interior for deft Kent Frizzell & Harvey Willoughby, Regional Director of Region 6, etc. for Ddt Dr. Charles M. Loveless . . . C.O.S.
MOTION of Pltfs to Strike: Alternatively, Motion for the Taking of Oral Testimony and for the Issuance of a Subpoena Duces Tecum . . . (to strike affidavit of Loren Keith Parcher: subpoena for U.S. Fish & Wildlife Serv.) . . . C.O.S. . . . with attachments

6/17 Memorandum in Opposition to Pltf's Motion to Strike . . . C.O.M.

6/19 Sgd (RHMcW, FMW, RPM) 6/7/76 . . . ORDER Substitution of Parties . . . Thomas S. Kleppe, as Sec. of the Interior & Harvey Willoughby as Regional Director of Region 6 are substituted as dfdts for Kent Frizzell & Dr. Charles M. Loveless

DATE	PROCEEDINGS

6/30 MOTION of Plf for Summary Judgment . . . COM
Memo in Support of Plf Motion for Summary Judgment . . . COM
Affidavit of John P. Akolt III

7/13 NOTICE OF INFORMAL CONFERENCE . . . set 8 a.m. 7/20/76 . . . C.O.M. . . . eod 7/14/76
MANDATE . . . Jugdment Affirmed . . . eod 7/16/76.
Opinion.

7/19 PETITION of National Audubon Society & the Environmental Defense Fund, Inc to appear as *amici curiae* . . . COM

7/20 Ltr from FMW to counsel vacating 8/23/76 hearing on motions for summary judgment

7/21 Vol 1 Record on Appeal received

7/22 Notice to Take Depositions upon oral examination of all pltfs: L. DOUGLAS ALLARD, PIERRE G. BVOIS, DENIS C. EROS & Robert G. WARD . . . COS
Request for Production of Documents by dfdts . . . COS

7/27 Sgd (RHMcW: FMW: RPM) ORDER . . . the request of the National Audubon Society & the Environmental Defense Fund to appear as amicus curiae is DENIED . . . COM eod 7/28/76

8/2 Pltf's Response to dfdt's req. for production of documents & pltf's MOTION for Protective Orders re: dfdt's Notice to Take Depositions

8/6 Sgd (FMW) ORDER . . . intelligence requested from U.S. Attny office re Immunity from federal & state prosecution . . . see document for details . . . COM . . . eod 8/9/76

8/9 REQUEST by Pltfs for entry of formal order compelling answer to interrogs & req. for admiss . . . COM

8/12 Certificate of Mailing of Pltf's Interrogs to dfts, second set

DATE	PROCEEDINGS

8/13 Dfdt's Memorandum in Opposition to pltfs' motion for order to compel answers to interrogs & answers to requests for admissions & to pltfs' request for entry of formal order . . . COS

8/20 Hearing (FMW) Pltf's Req. for Entry of Formal Order . . . ORDERED: Gov't counsel to answer interrogs on or before 8/27/76 . . . recess . . . eod 8/23/76

Request of Dfdt for Production of Documents. . . . COS

9/13 Reply of Pltfs to Request for Production of Documents . . . COM

9/28 Certificate of Service on Answers to Pltf's Interrogs to dfdts, Second set

10/1 Dfdt's MOTION for Summary Judgment . . . COS

Memorandum in Opposition to Pltfs' Motion for Summary Judgment & In Support of Dfdt's Motion for Summary Judgment . . . with attachments

10/14 Pltf's Memorandum answer to the dfdt's motion for summary judgment dated 10/1/76 . . . with attachments . . . COM

Supplement to Pltfs' Memorandum in Opposition to defdt's Motion for partial summary judgment & amended Motion for partial summary judgment or to dismiss . . . COS

Response to Req. for Admissions, First Set

nswers to Pltf's Interrogs to dfdts, Second Set

10/27 REPLY of def to Plf Memorandum Answer . . . COS

11/24 Supplement to Dfdt's MOTION for Summary Judgment . . . COS w/attachments

1977

11/3 Sgd 11/1/77 (D.T. Lewis, Chief Judge) ORDER . . . 3/Judge panel shall now consist of James E. Barrett, Circuit Judge, Judge Winner & Judge Matsch . . . COM . . . eod 11/3/77

DATE	PROCEEDINGS

Memo of Clerk to Judge Barrett transmitting copy of ltr—if he does not get copy file from Judge McWilliams, we will provide him with a copy

11/23 NOTICE OF HEARING (FMW) . . . 3/Judge hearing set 1:30 p.m. 3/10/78 . . . COM . . . eod 11/23/77

1978

3/10 MOTION of Pltfs for Substitution of Parties

HEARING (JEB, FMW, RPM) TRIAL TO COURT . . . Motion for Substitution of dfdt parts is ORDERED: GRANTED . . . Matter taken under consideration of the Court . . . COM . . . eod 3/13/78

6/7 Sgd (JEB, FMW & RPM) MEMORANDUM OPINION & ORDER . . . ORDERED: the Clerk shall enter judgment for the pltfs declaring the subject regulations to be invalid & unenforceable as against the pltfs' property rights in feathers & artifacts owned before the effective date of the subject statute & enjoining the dfdts from any interference w/the exercise of such rights, including the rights of sale, barter or exchange . . . COM . . . eod 6/7/78

Sgd (JRM, Clerk)—Judgment . . . ORDERED: Judgment entered for the pltfs as set forth in the above Memorandum Opinion & Order . . . FURTHER ORDERED: Pltf shall recover costs upon the filing of a Bill of Costs with the Clerk of this Court w/in 10 days . . . COM . . . eod 6/7/78

7/5 NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES, filed by Defendants re Final Judgment entered June 7, 1978.

7/6 Copy of Letter from the Court of notification that a request for the transmission of the Record must be in writing with a designation.

7/14 Letter from the U.S. Attorney instructing that Edward Shawaker, Appellate Section, LANDS & NATURAL RESOURCES DIVISION, should be placed on the mailing list.

DATE	PROCEEDINGS

8/8 NOTICE OF APPEAL TO THE TENTH CIRCUIT OF APPEALS, filed by Defendants, re Fin. Judgment entered June 7, 1978. RECORD DUE: 9/18/78.

8/31 MOTION of Defendants to Extend Time to File Notice of Appeal to be directed to the Court of Appeals. C.O.S.

9/12 Signed (FMW) 9/12, ORDER that request for an extension of time to appeal to the Court of Appeals is *denied*. C.O.M. eod 9/15.

9/24 NOTICE OF APPEAL, filed by by Defendants, re Order of 9/12/78. Conf. set for Fri., Nov. 3, 1978, at 8:30 a.m., RECORD DUE: 12/4/78.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 75 1000

[Filed Sep. 19, 1978]

L. DOUGLAS ALLARD and CAROL S. ALLARD; PIERRE G. BOVIS and SYLVIA BOVIS; DENIS C. EROS; ALEXANDER G KELLEY; and ROBERT G. WARD; PLAINTIFFS

vs.

KENT FRIZZELL, Solicitor of the Department of the Interior and Acting Secretary of the Interior; NATHANIEL REED, Assistant Secretary of the United States Fish and Wildlife Service, Department of the Interior; LYNN GREENWALT, Director of the United States Fish and Wildlife Service, Department of the Interior; and DR. CHARLES M. LOVELESS, Regional Director of Region 6, United States Fish and Wildlife Service, Department of the Interior; DEFENDANTS

COMPLAINT

I. PROCEEDING

1. This is an action for declaratory relief pursuant to 28 U.S.C., § 2201, and for injunctive relief pursuant to 28 U.S.C., § 2282, for the purpose of determining a question in actual controversy between the parties hereto.

II. JURISDICTION

1. This action is filed pursuant to 28 U.S.C., § 1331, arising under the Constitution, Laws and Treaties of the United States wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs. This action is additionally filed pursuant to 28 U.S.C., § 1337, arising under an Act of Congress regulating commerce.

III. THREE JUDGE COURT

1. This action is filed to determine the applicability of and to enjoin enforcement of the Eagle Protection Act, 16 U.S.C., §§ 668-668b, and to determine the applicability of and to enjoin the enforcement of the Migratory Bird Treaty Act, 16 U.S.C., §§ 703-711, and to determine the applicability of and to enjoin enforcement of the applicable Regulations administered and enforced by the United States Fish and Wildlife Service, Department of the Interior, 12 CFR, Parts 10, 13, 21 and 22. The grounds upon which such Acts and Regulations are sought to be enjoined are that such Acts and Regulations violate Article I, Section 1; Article I, Section 8, Clause 3; Article I, Section 8, Clause 18, of the Constitution of the United States, and the Fifth Amendment and the Tenth Amendment to the Constitution of the United States, all as more particularly set forth herein. Pursuant to the provisions of 28 U.S.C., § 2282, this action is one for which a three judge court is required to be convened as provided by 28 U.S.C., § 2284.

IV. PLAINTIFFS' ALLEGATIONS

1. Plaintiffs L. Douglas Allard and Carol S. Allard, husband and wife, are residents and citizens of the State of Montana. Plaintiffs are the sole owners of a proprietorship operated under the name and style of "Flathead Indian Museum", situate in St. Ignatius, Montana.

Said Plaintiffs are the owners of Indian artifacts composed in part of the feathers of golden eagles, owls and other birds purportedly within the Eagle Protection Act and the Migratory Bird Treaty Act, but which birds were obtained prior to the effective date of Federal protection of such birds pursuant to the Eagle Protection Act and the Migratory Bird Treaty Act.

If such artifacts are permitted to enter into lawful commerce, the fair market value of such artifacts would be in excess of $10,000; however, if such artifacts are unlawful to trade, barter or sell, such would be rendered valueless.

Said Plaintiffs have in the past exhibited, sold and purchased Indian artifacts in the State of Colorado and reasonably expect to do so in the future. The application of the Eagle Protection Act, Migratory Bird Treaty Act, and the Regulations of the Department of the Interior pertinent thereto, to artifacts composed in part of the feathers of birds purportedly within the protection of the above noted Acts and Regulations, but which birds were obtained prior to the effective date of Federal protection of such birds, restricts the ability of the Plaintiffs to engage in their lawful occupation and destroys a valuable property right of the Plaintiffs, which business has a value in excess of $10,000.

Plaintiff L. Douglas Allard has been prosecuted within the District of Montana for the sale of Indian artifacts composed in part of the feathers of birds purportedly protected by the Eagle Protection Act. Such action appears on the docket of the United States District Court for the District of Montana as Criminal Action No. CR-75-6-M. Plaintiff has been found guilty in such action and was sentenced to a fine of $100.00 per count, from which no appeal was lodged.

The application of the Eagle Protection Act and the Migratory Bird Treaty Act and the Regulations issued thereunder by the Department of Interior to the property of the Plaintiffs destroys the value of their property, restricts their ability to engage in their lawful occupation, has subjected L. Douglas Allard to criminal prosecution, and subjects Plaintiffs to the threat of additional prosecution, civil penalty assessments, and significant forfeiture of property to the United States pursuant to the Eagle Protection Act, the Migratory Bird Treaty Act, and the Regulations issued thereunder by the Department of the Interior.

2. Plaintiffs Pierre G. Bovis and Sylvia Bovis, husband and wife, are residents and citizens of the State of New Mexico. Plaintiffs are the sole owners of a proprietorship operated under the name and style of "Winona American Indian Trading Post" situate in Santa Fe, New Mexico.

Said Plaintiffs are the owners of Indian artifacts composed in part of the feathers of golden eagles, hawks,

owls, ospreys, and other birds purportedly within the Eagle Protection Act and the Migratory Bird Treaty Act, but which birds were obtained prior to the effective date of Federal protection of such birds pursuant to the Eagle Protection Act and the Migratory Bird Treaty Act.

If such artifacts are permitted to enter into lawful commerce, the fair market value of such artifacts would be in excess of $10,000; however, if such artifacts are unlawful to trade, barter or sell, such would be rendered valueless.

Said Plaintiffs have in the past exhibited, sold and purchased Indian artifacts in the State of Colorado and reasonably expect to do in the future. The application of the Eagle Protection Act, Migratory Bird Treaty Act and the Regulations of the Department of the Interior pertinent thereto to artifacts composed in part of the feathers of birds purportedly within the protection of the above noted Acts and Regulations, but which birds were obtained prior to the effective date of Federal protection of such birds, restricts the ability of the Plaintiffs to engage in their lawful occupation and destroys a valuable property right of the Plaintiffs, which business has a value in excess of $10,000.

Plaintiff Pierre G. Bovis has been prosecuted within the District of Colorado for offering for sale Indian artifacts composed in part of the feathers of birds purportedly protected by the Eagle Protection Act and the Migratory Bird Treaty Act. Such action appears on the docket of this Court as Criminal Actions Nos. 75-CR-63 and 75-CR-66. Plaintiff pleaded *nolo contendere* to the charges in such actions, which pleas were accepted by the Honorable Fred W. Winner, and sentence was entered on April 4, 1975.

The application of the Eagle Protection Act and the Migratory Bird Treaty Act and the Regulations issued thereunder by the Department of Interior to the property of the Plaintiffs destroys the value of their property, restricts their ability to engage in their lawful occupation, has subjected Pierre G. Bovis to criminal prosecution, and subjects Plaintiffs to the threat of additional prosecution, civil penalty assessments, and significant

forfeiture of property to the United States pursuant to the Eagle Protection Act, the Migratory Bird Treaty Act, and the Regulations issued thereunder by the Department of the Interior.

3. Plaintiff Denis C. Eros is a resident and citizen of the State of California. Said Plaintiff is the General Partner of a Limited Partnership operated under the name and style of "American Indian Artifact Catalog Co", situate in Watsonville, California.

Said Plaintiff, through the partnership above noted, publishes price guides reporting current prices of Indian artifacts, which artifacts include those which are composed in part of the feathers of various birds. Said Plaintiff additionally from time to time is employed by various persons, firms and organizations to appraise the value of Indian artifacts, which artifacts include those which are composed in part of the feathers of various birds.

The value of said Plaintiff's general partnership interest and employment as an expert appraiser of Indian artifacts is in excess of $10,000.

The application of the Eagle Protection Act, the Migratory Bird Treaty Act and the Regulations of the Department of Interior pertinent thereto to artifacts composed in part of the feathers of birds purportedly within the protection of the above noted Acts and Regulations, but which birds were obtained prior to the effective date of Federal protection of such birds, restricts the ability of the Plaintiff to engage in his lawful occupation and makes it impossible for the Plaintiff to provide accurate appraisals of value of the artifacts above described.

4. Plaintiff Alexander G. Kelley is a resident and citizen of the State of New Mexico. Said Plaintiff is an employee of Pierre G. and Sylvia Bovis at the Winona American Indian Trading Post situate in Santa Fe, New Mexico.

Said Plaintiff, acting in his lawful occupation above noted, is of necessity involved with artifacts composed in part of the feathers of birds. The purported application of the Eagle Protection Act, Migratory Bird Treaty Act and the Regulations of the Department of the Interior pertinent thereto to artifacts composed in part of

the feathers of birds purportedly within the protection of the above noted Acts and Regulations, but which birds were obtained prior to the effective date of Federal protection of such birds, restricts the ability of the Plaintiff to engage in his lawful occupation, which employment and occupation is a valuable property right of the Plaintiff having a value in excess of $10,000.

5. Plaintiff Robert G. Ward is a resident and citizen of the State of New Mexico. Plaintiff is the owner of a proprietorship operated under the name and style of "The Original Trading Post", situate in Santa Fe, New Mexico.

Said Plaintiff is the owner of Indian artifacts composed in part of the feathers of golden eagles, hawks, owls and other birds purportedly within the Eagle Protection Act and the Migratory Bird Treaty Act, but which birds were obtained prior to the effective date of Federal protection of such birds pursuant to the Eagle Protection Act and the Migratory Bird Treaty Act.

If such artifacts are permitted to enter into lawful commerce, the fair market value of such artifacts would be in excess of $10,000; however, if such artifacts are unlawful to trade, barter or sell, such would be rendered valueless.

Said Plaintiff has in the past exhibited, sold and purchased Indian artifacts in the State of Colorado and reasonably expects to do so in the future. The application of the Eagle Protection Act, Migratory Bird Treaty Act and the Regulations of the Department of the Interior pertinent thereto to artifacts composed in part of the feathers of birds purportedly within the protection of the above noted Acts and Regulations, but which birds were obtained prior to the effective date of Federal protection of such birds, restricts the ability of the Plaintiff to engage in his lawful occupation and destroys a valuable property right of the Plaintiff, which business has a value in excess of $10,000.

The application of the Eagle Protection Act and the Migratory Bird Treaty Act and the Regulations issued thereunder by the Department of Interior to the property of the Plaintiff destroys the value of his property, restricts his ability to engage in his lawful occupation,

and subjects Plaintiff to the threat of prosecution, civil penalty assessments, and significant forfeiture of property to the United States pursuant to the Eagle Protection Act, the Migratory Bird Treaty Act, and the Regulations issued thereunder by the Department of the Interior.

V. DEFENDANTS

1. The Defendants herein are the following:

A. Kent Frizzell, as Solicitor of the Department of the Interior and as Acting Secretary of the Interior;

B. Nathaniel Reed, as Assistant Secretary of the United States Fish and Wildlife Service, Department of the Interior;

C. Lynn Greenwalt, as Director of the United States Fish and Wildlife Service, Department of the Interior.

Each of the above named Defendants is named in his capacity as an Officer of the United States, and each office is maintained in Washington, District of Columbia.

D. Dr. Charles M. Loveless, as Regional Director for Region 6, United States Fish and Wildlife Service, Department of the Interior.

Region 6 of the United States Fish and Wildlife Service, Department of the Interior, includes the States of Colorado, Montana, North Dakota, South Dakota, Wyoming, Nebraska, Iowa, Utah, Kansas and Missouri.

The Defendant Dr. Charles M. Loveless is a citizen and resident of the State of Colorado.

Each of the foregoing Defendants is charged by law with the enforcement and administration of the Eagle Protection Act and with the Migratory Bird Treaty Act, and each has an interest in this proceeding and the issues herein involved.

2. 16 U.S.C., § 742b, being a statute concerning the reorganization of the Department of the Interior, has established the United States Fish and Wildlife Service, hereinafter referred to as "Service." The Service is charged with the administration and enforcement of the Migratory Bird Treaty Act and the Eagle Protection Act, and the Secretary of the Interior is authorized to adopt suitable regulations with respect to the Migratory Bird Treaty Act and the Eagle Protection Act.

VI. THE MIGRATORY BIRD TREATY ACT, 16 U.S.C., §§ 703-711, AND REGULATIONS THERETO, 12 CFR, PARTS 10, 13 AND 21.

A. *Due Process.*

1. By Act of June 20, 1936, the Migratory Bird Treaty Act, 16 U.S.C., § 703, hereinafter referred to as "Migratory Bird Act", became a law, providing, in part, as follows:

> "*Taking, killing, or possession migratory birds unlawful.*—Unless and except as permitted by regulations made as hereinafter provided, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, or any part, nest, or egg of any such birds, included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916, and the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936."

A copy of the Migratory Bird Treaty Act is attached hereto as Exhibit "A".

Pursuant to the Act of June 1, 1974, Public Law 93-300, said Act has been amended so as to include migratory birds and birds in danger of extinction included in the Treaty between the United States and the Government of Japan, concluded March 4, 1972, which amendment is to take effect on the date on which the President proclaims the exchange of ratifications of the Convention. Said proclamation of the exchange of ratification has not yet taken place.

2. 16 U.S.C., § 707(a), declares any violation of any provision of the Migratory Bird Act or Regulations adopted pursuant to the Migratory Bird Act constitutes a misdemeanor and is punishable by a fine of not more than $500 or imprisonment of not more than 6 months, or both. (Pursuant to 16 U.S.C., § 707(b), some specific acts may be punished by a fine of not more than $2,000, or imprisonment up to two years, or both.)

3. Pursuant to the purported authority granted by the Migratory Bird Act, the Department of the Interior has adopted various Regulations for the enforcement and administration of the Migratory Bird Act, and such Regulations remain in force and effect.

12 CFR, § 10.12, provides, in part:

> " 'Migratory birds means all birds, whether or not raised in captivity, included in the terms of conventions between the United States and any foreign country for the protection of migratory birds and the Migratory Bird Treaty Act, 16 U.S.C. 703-711. (For reference purposes only a list of migratory birds by species appears in § 10.13.)"

12 CFR, § 21.2 provides, in part:

> "(a) Migratory birds, their parts, nests, or eggs, lawfully acquired prior to the effective date of Federal protection under the Migratory Bird Treaty Act (16 U.S.C. 703-711) may be possessed or transported without a Federal permit, but may not be imported, exported, purchased, sold, bartered, or offered for purchase, sale, trade, or barter, and all shipments of such birds must be marked as provided by 18 U.S.C. 44 and § 14.81 of this subchapter: *Provided*, That no exemption for any statute or regulation shall accrue to any offspring of such birds."

A copy of the Regulations pertinent to the Migratory Bird Treaty Act is attached hereto as Exhibit "B".

4. Plaintiffs allege the Migratory Bird Act and the Regulations referred to above do not apply to their property and business insofar as such property consists of artifacts composed of parts of birds which were obtained prior to the effective date of Federal protection under the Migratory Bird Act, but Plaintiffs have been

informed by the Service that importation, exportation, purchase, sale, barter, or offering for purchase, sale, trade, or barter of any part of any bird included within the Migratory Bird Act is declared by the Service to be unlawful, and any such act by any Plaintiff would be prosecuted. A copy of a Notice from the Service sent to Plaintiff Robert G. Ward evidencing the Service's intention to enforce the terms of the Migratory Bird Treaty Act and the Eagle Protection Act as above stated is attached hereto as Exhibit "C".

5. Plaintiffs allege and contend that if the Migratory Bird Act and the applicable Regulations above noted do apply to the importation, exportation, purchase, sale, barter, or offering or purchase, sale, trade or barter of any part of any bird which was obtained prior to the effective date of the Federal protection of such bird, that such statute and regulations are illegal, unconstitutional, and without the force of law as a deprivation of property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

6. Plaintiffs allege and contend that if the Migratory Bird Act and the applicable Regulations above noted restrict the importation, exportation, purchase, sale, barter, or offering for purchase, sale, trade or barter of any part of any bird included within the Migratory Bird Act, which bird or part thereof was obtained prior to the effective date of the Federal protection of such bird, that such restrictions are arbitrary, capricious and not rationally related to a legitimate regulatory purpose and are beyond the power of Congress to regulate pursuant to Article I, Section 1; Article I, Section 8, Clause 3; and Article I, Section 8, Clause 18, of the Constitution of the United States.

B. *Vagueness.*

1. The Migratory Bird Act, 16 U.S.C., § 703, does not specify any protected birds. Rather, by reference to particular Treaties, various birds are included within the protection of the Migratory Bird Act. The particular Treaties included by reference in the Migratory Bird Act are:

(1) A Convention between the United States and Great Britain, concluded August 16, 1916 (39 Stat. 1702). A copy of such Convention is attached hereto as Exhibit "D".

(2) A Convention between the United States and Mexico, concluded February 7, 1936 (50 Stat. 1311). A copy of such Convention is attached hereto as Exhibit "E".

(3) By Executive Order No. 11629, dated October 28, 1971, the President delegated his authority to the Secretary of State to provide for additional species of birds to be included within the Convention between the United States and Mexico. By an exchange of letters, dated March 10, 1972, between the Ambassadors of the United States and Mexico, 32 separate "families" of birds were added to the Convention between the United States and Mexico. Executive Order No. 11629 is attached hereto as Exhibit "F". The letters of March 10, 1972, are attached hereto as Exhibit "G".

(4) A Convention between the United States and Japan, concluded March 4, 1972. The exchange of these ratifications has not yet been proclaimed, and the addition of this Treaty within the Migratory Bird Act is not yet effective. A copy of such Convention is attached hereto as Exhibit "H".

2. The Convention between the United States and Great Britain provides, in part, for the protection of the following birds:

> "2. Migratory Insectivorous Birds:
>
> . . . and all other perching birds which feed entirely or chiefly on insects."

Being incorporated by reference within the Migratory Bird Act, such language is vague and indefinite, and fails to adequately fix and ascertain a standard of conduct, and fails to convey a sufficiently definite warning as to the proscribed conduct such that men of common intelligence must necessarily guess at its meaning and differ as to its application. For such reason, the Migratory Bird Act and the Regulations issued with respect thereto are unconstitutional as a vague, indefinite and uncertain law,

in violation of the Fifth Amendment to the Constitution of the United States.

3. The Convention between the United States and Mexico specifies protected birds only by reference to the taxonomic classification of "family." The classification system being used and the time at which such classification was made are not specified.

4. Plaintiffs are informed and believe, and upon such information and belief, Plaintiffs allege the only term of precision used to identify a particular bird is the "species" classification. There are existing various taxonomic systems, each of which may present a rational and orderly system of classification; however, a particular species of bird may be classified by one system in one "family" and by another classification system in a different "family." Additionally, within any single taxonomic system the classification of a particular species of bird may be changed from one "family" to another "family" from time to time, and such changes can reasonably expect to continue in the future.

Each of the Plaintiffs, in the collection of Indian artifacts which he owns and in conducting his lawful business of dealing in Indian artifacts, is, of necessity, involved with artifacts that are composed in part of feathers of birds. Due to the vagueness of the identification of protected species of birds included in the Migratory Bird Act and the Regulations issued thereunder, Plaintiffs are unable to determine whether such artifacts fall within the terms and provisions of such Act and Regulations, and are, therefore, unable to reasonably apprise themselves of the lawfulness of their conduct.

5. Incorporating the terms of the various Treaties by reference, the Migratory Bird Act and the Regulations issued thereunder have left uncertain and indefinite the species of birds protected by the Act. The specific identification of birds has not been made, the system of classification being utilized has not been stated, and there are existing recognized systems of classification which conflict with respect to the family name of any particular species of bird, and within any existing classification system there have been and reasonably will continue to be changes of a particular species of bird from one family

to another. Such make the Migratory Bird Act and the Regulations issued thereunder vague and indefinite, fail to reasonably apprise individuals of common intelligence of the nature of the proscribed conduct, leaving individuals of necessity to guess at its meaning and to differ as to its application. For such reasons, the Migratory Bird Act and the Regulations issued thereunder are a vague, indefinite and uncertain law, in violation of the Fifth Amendment to the Constitution of the United States.

C. *Unlawful Delegation.*

1. The Convention between the United States and Mexico provides, in part, for the protection of the following birds:

> "Others which the Presidents of the United States of America and the United Mexican States may determine by common agreement."

2. By Executive Order No. 11629, dated October 28, 1971, the President of the United States did purport to delegate to the Secretary of State his authority to agree with the President of Mexico for the inclusion of additional species of birds within the protection of the Convention. By letter of March 10, 1972, the United States Ambassador to Mexico, Mr. Robert H. McBride, did agree to the inclusion of 32 additional families of birds within the Convention.

3. Incorporated by reference within the Migratory Bird Act, the addition of birds within the Convention by letter of March 10, 1972, is an unlawful delegation of Legislative power to the Executive. The delegation sets forth no Legislative policy or objective, and sets forth no standards for directing the actions of the Executive. Such delegation of Legislative authority is equally granted to the President of the United Mexican States, for it is only by *common agreement* that additional birds have been included within the Convention between the United States and Mexico, and by reference have been included within the Migratory Bird Act. The determination of the President of the United Mexican States as to the inclusion of additional birds within the Conven-

tion has not been nor could it be governed by any Legislative standards intended to have been set forth by the Congress of the United States.

4. Such incorporation of additional families of birds by reference within the Migratory Bird Act is an unlawful delegation of Legislative power to the Executive and to a foreign sovereign, in violation of Article I, Section 1, of the Constitution of the United States.

5. Executive Order No. 11629, dated October 28, 1971, purports to be a delegation from the President of the United States to the Secretary of State to provide, by common agreement with the President of Mexico, for additional species of birds to be protected by the Convention between the United States and Mexico.

6. Upon information and belief, Plaintiffs allege the Secretary of State did not agree with the President of Mexico for the inclusion of different birds within the Convention, but, rather, Mr. Robert H. McBride, the American Ambassador to Mexico, did, by letter dated March 10, 1972, provide for the inclusion of additional families of birds within the Convention.

7. Pursuant to Section 2 of Executive Order No. 11629, in providing for additional birds to be brought within the protection of the Convention, the Secretary of State was directed to consult with the Secretary of the Interior. Upon information and belief, Plaintiffs allege the consultation between the Secretary of State and the Secretary of Interior, mandated by Section 2 of Executive Order No. 11629, did not occur.

8. Pursuant to Section 1 of Executive Order No. 11629 in providing for additional birds to be brought within the protection of the Convention, the Secretary of State was directed to provide for such birds by *species*. The letter of March 10, 1972, does not provide for the inclusion of additional birds by species, but, rather, utilizes the taxonomic classification of "family."

9. Plaintiffs allege that for such reasons, the letter of March 10, 1972, is void and of no effect, and any birds intended to have been thereby included within the Convention between the United States and Mexico are not so included. Any "family" of birds set forth in the

letter of March 10, 1972, is not incorporated by reference within the Migratory Bird Act, and is not, therefore, within any Regulation based thereon, and all such Regulations based upon such letter are void and of not effect as such Regulations are not based upon a lawful Legislative Act, and thus constitute a Legislative act by the Executive branch of the Government, in violation of Article I, Section 1, of the Constitution of the United States.

VII. EAGLE PROTECTION ACT, 16 U.S.C., SEC. 668; 12 CFR, PART 22

1. By Amendment of October 23, 1972, being an Act relating to the protection of bald eagles and golden eagles, 16 U.S.C., § 668, became law and remains in force and effect, and provides, in part, as follows:

> *"Bald eagles—Possession, transportation or sale of birds, nests, or eggs prohibited—Penalty.*—(a) Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as hereinafter provided, shall knowingly, or with wanton disregard for the consequences of his act take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle commonly known as the American eagle, or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this Act [16 USCS §§ 668-668d], shall be fined not more than $5,000 or imprisoned not more than one year or both; Provided, That in the case of a second or subsequent conviction for a violation of this section committed after the date of the enactment of this proviso [Oct. 23, 1972], such person shall be fined not more than $10,000 or imprisoned not more than two years, or both; . . . Provided further, That nothing herein shall be construed to prohibit possession or transportation of any bald eagle, alive or dead, or any part, nest or egg thereof, lawfully

taken prior to June 8, 1940, and that nothing herein shall be construed to prohibit possession or transportation of any golden eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to the addition of this Act [16 USCS §§ 668-668a] of the provisions relating to preservation of the golden eagle."

A copy of the Eagle Protection Act is attached hereto as Exhibit "I".

2. Pursuant to 16 U.S.C., § 668a, the Secretary of the Interior is authorized to provide for regulations for the administration and enforcement of the Eagle Protection Act, and a violation of any permit or regulation can result in a fine of not more than $5,000, or imprisonment of not more than one year, or both, a civil penalty to be assessed by the Secretary of the Interior of not more than $5,000 for each violation, and 16 U.S.C., § 668b(b), provides for forfeiture of various properties to the United States.

3. Pursuant to such authority, the Secretary of the Interior has enacted various Regulations, which Regulations remain in force and effect.

12 CFR, §§ 22.12, provides, in part, as follows:

> "No person shall sell, purchase, barter, trade, or offer for sale, purchase, barter, or trade, export or import, at any time or in any manner, any bald eagle (*Haliaeetus leucocephalus*), or any golden eagle (*Aquila chrysaetos*) or the parts, nests, or eggs of such birds, and no permit will be issued to authorize such acts."

A copy of the Regulations pertinent to the Eagle Protection Act is attached hereto as Exhibit "J".

4. Plaintiffs allege and contend the Eagle Protection Act and the Regulations issued thereunder do not apply to artifacts composed in part of feathers or other parts of golden or bald eagles which were obtained prior to the effective date of Federal protection for such birds pursuant to the Eagle Protection Act. Plaintiffs have been informed by the Service, however, the sale, purchase, barter, trade, or offering for sale, purchase, barter or

offering for sale, purchase, barter or trade, export or import of any artifact composed of the feathers or other parts of a golden or bald eagle, regardless of when such birds were obtained, has been declared by the Service to be unlawful, and that any such act by any of the Plaintiffs would be prosecuted. (See Exhibit "C")

5. Plaintiffs allege and contend that if the Eagle Protection Act does prohibit the purchasing, selling, bartering, trading, or offering for sale, purchase, barter, or trade, export or import of artifacts which are composed in part of feathers or other parts of bald or golden eagles, which birds were obtained prior to the effective date of Federal protection for such birds, then such Law and Regulations issued thereunder are illegal, unconstitutional, and without the force of law as a deprivation of property without due process of law, in violation of the Fifth Amendment of the Constitution of the United States.

6. Plaintiffs allege and contend that if the Eagle Protection Act and the Regulations issued thereunder do restrict the sale, purchase, barter, trade, or offering for sale, purchase, barter, or trade, export or import of any artifact composed in part of any bald eagle or golden eagle, which birds were obtained prior to the effective date of the Federal protection of such birds, then such Act and Regulations are arbitrary, capricious, and not rationally related to a legitimate regulatory purpose, and are beyond the power of Congress to regulate pursuant to Article I, Section 1; Article I, Section 8, Clause 3; and Article I, Section 8, Clause 18, of the Constitution of the United States.

7. 16 U.S.C., § 668, does not identify the type of eagles protected by species. The statute uses only the common name, "golden eagle." Upon information and belief, Plaintiffs allege that there are at least five recognized subspecies of the species of "*Aquila Chrysaetos*", only one of which sub-species is found in North America. Plaintiffs allege that 16 U.S.C., § 668, applies only to the subspecies of the golden eagle native to North America, *Aquila Chrysaetos Canadensis*.

Upon information and belief, Plaintiffs allege that the other sub-species of *Aquila Chrysaetos* are known by

other common names throughout the world where they are found, such that the use of the common name "golden eagle" in 16 U.S.C., § 668, is vague and indefinite, and fails to reasonably apprise individuals of common intelligence of the nature of the proscribed conduct, leaving individuals of necessity to guess at its meaning and to differ as to its application. For such reason, the Eagle Protection Act and the Regulations issued thereunder are a vague, indefinite and uncertain law, in violation of the Fifth Amendment to the Constitution of the United States.

8. The Eagle Protection Act, 16 U.S.C., § 668, and the matters regulated therein are beyond the authority of the Congress of the United States to legislate and is an exercise of power reserved to the States, in violation of the Tenth Amendment to the Constitution of the United States.

WHEREFORE, Plaintiffs pray as follows:

A. This Court declare the Migratory Bird Treaty Act, 16 U.S.C., §§ 703, et seq.; the Eagle Protection Act, 16 U.S.C., §§ 668, et seq.; and the Regulations of the Department of the Interior issued thereunder, being 50 CFR, Parts 10, 13, 21 and 22, are inapplicable to birds or parts thereof which were obtained prior to the effective date of Federal protection of such birds.

B. That if the Migratory Bird Treaty Act, the Eagle Protection Act, and the Regulations issued thereunder, above noted, do apply to birds or parts thereof obtained prior to the effective date of Federal protection of such birds, this Court declare such Acts and Regulations above noted are void, unconstitutional, ineffective and without the force of law as a deprivation of property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States, and as an arbitrary and capricious restriction, not rationally related to a legitimate regulatory purpose in violation of Article I, Section 1, of the Constitution of the United States.

C. This Court declare the Migratory Bird Treaty Act and the Regulations issued thereunder are vague and

indefinite for failing to sufficiently identify the birds protected thereunder, in violation of the Fifth Amendment to the Constitution of the United States.

D. This Court declare that certain letter dated March 10, 1972, between the United States of America and the United Mexican States providing for additional birds to be added to the protection of the Convention between the United States and Mexico, is void and of no effect as an unlawful delegation of Legislative power, in violation of Article I, Section 1, of the Constitution of the United States, and is void and of no effect for failing to comply with those certain terms and conditions specified in Executive Order No. 11629 dated October 28, 1971.

E. This Court declare that the Eagle Protection Act, 16 U.S.C. §§ 668, et seq., and the Regulations issued thereunder, unconstitutional as an exercise of Legislative power by the Congress of the United States, which power is reserved to the States, in violation of the Tenth Amendment to the Constitution of the United States; that the Eagle Protection Act and the Regulations issued thereunder are vague and indefinite for the failure to sufficiently identify the birds protected thereunder, in violation of the Fifth Amendment to the Constitution of the United States, or that such Act and the Regulations issued thereunder apply only to the sub-species of "golden eagle" native to North America, being "*Aquila Chrysaetos Canadensis.*"

F. This Court declare, for the above reasons, that the Plaintiffs are not required to comply with the terms and provisions of the Acts and Regulations above noted insofar as such Acts and Regulations cannot restrict the rights of the Plaintiffs to acquire, keep and dispose by trade, sale or barter, artifacts composed in part of the feathers or other parts of birds protected by the above noted Acts and Regulations but which birds were obtained prior to the effective date of the Federal protection of such birds.

G. The Defendants and each of them, their agents and servants, be permanently restrained and enjoined by this Court from exercising any of the powers, rights or duties respecting the enforcement of the Migratory Bird

Treaty Act, the Eagle Protection Act, and the Regulations issued thereunder, against the Plaintiffs insofar as such are applied to the property of the Plaintiffs consisting in part of the birds or parts of birds obtained prior to the effective date of Federal protection of such birds.

H. For costs, and for such other and further relief as the Court may deem just and equitable.

DATED this 19th day of September, 1975.

/s/ Akolt, Dick & Akolt
AKOLT, DICK & AKOLT

/s/ John P. Akolt, III
JOHN P. AKOLT, III
Attorneys for Plaintiffs
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1660 Lincoln Street
Denver, Colorado 80203
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Addresses of Plaintiffs:

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Mr. and Mrs. Pierre Bovis
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Santa Fe, New Mexico 87501

Mr. Denis C. Eros
Box 1005
Watsonville, California 95076

Mr. Alexander G. Kelley
306 Rio Vista Place
Santa Fe, New Mexico 87501

Mr. Robert G. Ward
Box 179
Santa Fe, New Mexico 87501

EXHIBITS

The following exhibits have been omitted:

A. The Migratory Bird Treaty Act, 16 U.S.C. 703 *et seq.*

B. 50 C.F.R. 10.1-10.22; 21.1-21.46.

D. Convention between United States and Great Britain, signed August 18, 1916.

E. Convention between United States and Mexico, signed February 7, 1936.

F. Executive Order No. 11629, signed October 26, 1971.

G. Agreement supplementing the convention between the United States and Mexico of February 7, 1936. The agreement entered into force March 10, 1972.

H. Convention between United States and Japan, signed March 4, 1972.

I. The Eagle Protection Act, 16 U.S.C. 668 *et seq.*

J. 50 C.F.R. 22.1-22.32.

Exhibit C has been reproduced.

EXHIBIT C

DEPARTMENT OF THE INTERIOR
BUREAU OF SPORT FISHERIES AND WILDLIFE

SPECIAL AGENT
U.S. PARKS & WILDLIFE SERVICE
2721 N. Central Ave.
Phoenix, Arizona 85004

CERTIFIED
No. 005117
MAIL

[Canceled—Apr. 16, 1975]

POSTAGE AND FEES PAID (USPS)

[SEAL]

U.S. DEPARTMENT OF THE INTERIOR

Bob Ward Indian Traders
201 W. San Francisco
Santa Fe, NM 87501

UNITED STATES
DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
Division of Law Enforcement
2721 N. Central
Phoenix, Arizona 85004

ALL INDIAN ARTS AND CRAFTS DEALERS:

The following excerpts from the United States Code and Code of Federal Regulations relating to endangered species of wildlife are cited for your information:

16 USC 1532. Definitions

For the purpose of this chapter—

(4) The term "endangered species" means any species which is in danger of extension throughout all or a significant portion of its range. . .

(5) The term "fish and wildlife" means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof. . .

16 USC 1538. Prohibited acts—Generally

(a)(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

50 CFR 17.11

Based on the best scientific and commercial data available to him and after consultation, in cooperation with

the Secretary of State, with the foreign country or countries in which such wildlife are normally found and, to the extent practicable, with interested Federal agencies, the Secretary has determined that the species or subspecies of wildlife listed below are threatened with worldwide extinction due to one or more of the factors listed in Endangered Species Act of 1973,

Common name	Scientific name	Where found
Reptiles:		
Turtle, Hawksbill	Eretmochelys imbricata	Tropical seas.
MAMMALS:		
Whale, Sperm	Physeter catodon	Oceanic

UNITED STATES
DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
Division of Law Enforcement
2721 N. Central
Phoenix, Arizona 85004

ALL INDIAN ARTS AND CRAFTS DEALERS:

The following excerpts from the United States Code and Code of Federal Regulations relating to migratory birds and their parts are cited for your information:

16 USC 703

Unless and except as permitted by regulations made as hereinafter provided in sections 703-711 of this title, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import cause to be shipped, exported or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or received for shipment, transportation, carriage, or export, any migratory bird, or any part, nest, or egg of any such birds, included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), and the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936. . .

50 CFR 21.2

(a) Migratory birds, their parts, nests, or eggs, lawfully acquired prior to the effective date of Federal protection under the Migratory Bird Treaty Act (16 USC 703-711) may be possessed or transported without a Federal permit, but may not be imported, exported, purchased, sold, bartered, or offered for purchase, sale, trade or barter. . .

16 USC 668

(a) Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as provided in sections 668 to 668d of this title, shall knowingly, or with wanton disregard for the consequences of his act take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle commonly known as the American Eagle, or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to sections 668 to 668d of this title, shall be fined not more than $5,000 or imprisioned not more than one year or both. . .

50 CFR 22.2

(a) Bald eagles, alive or dead, or their parts, nests, or eggs lawfully acquired prior to June 8, 1940, and golden eagles, alive or dead, or their parts, nests, or eggs lawfully acquired prior to October 24, 1962, may be possessed, or transported without a Federal permit, but may not be imported, exported, purchased, sold traded, bartered, or offered for purchase, sale, trade or barter. . .

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action 75-W-1000

L. DOUGLAS ALLARD and CAROL S. ALLARD; PIERRE G. BOVIS and SYLVIA BOVIS; DENIS C. EROS; ALEXANDER G. KELLEY; and ROBERT G. WARD; PLAINTIFFS

v.

KENT FRIZZELL, Solicitor of the Department of the Interior and Acting Secretary of the Interior; NATHANIEL REED, Assistant Secretary of the United States Fish and Wildlife Service, Department of the Interior; LYNN GREENWALT, Director of the United States Fish and Wildlife Service, Department of the Interior; and DR. CHARLES M. LOVELESS, Regional Director of Region 6, United States Fish and Wildlife Service, Department of the Interior; DEFENDANTS

ANSWER

Defendants, by their attorney, answer the plaintiffs' complaint as follows:

1. Parts I, II and III of the complaint are statements of law requiring no response, except that, as to Part II, the defendants lack information to form a belief as to the truthfulness of the allegation that the amount in controversy exceeds $10,000.

2. Defendants lack information upon which to plead as to Part IV, except that defendants admit the fifth paragraph under section 1 and the fifth paragraph under section 2 and deny the allegations that the statutes and regulations cited destroy the value of plaintiffs' property and restrict their right to engage in lawful occupations.

3. Part V.1 is admitted, except that Thomas S. Kleppe is Secretary of the Interior; Nathaniel Reed is Assistant Secretary for Fish and Wildlife and Parks; and Harvey Willoughby is Acting Director of Region 6, Fish and Wildlife Service. Part V.2 is a statement of law for which no response is required.

4. Part VI.A.1-3 are statements of law for which no response is required. Part VI.A.5 and 6 are denied, and Part VI.A.4 is admitted, except defendants deny the allegation that the statutes and regulations are inapplicable to the plaintiffs.

5. Part VI.B is denied except for statements of law contained therein for which no response is required.

6. Part VI.C is denied except for statements of law for which no response is required. Part VI.C.6 is denied on the grounds that the American Ambassador has been duly delegated by the Secretary of State to include additional bird families in the Convention.

7. Part VII is denied other than as to statements of law for which no response is required, except that paragraph 4 is admitted except for the first sentence, which is denied, and that the third sentence in paragraph 7 is admitted.

First Defense

The complaint fails to state a claim upon which relief may be granted.

Second Defense

Plaintiffs Eros, Kelley and Allard lack standing to sue.

Respectfully submitted,

JAMES L. TREECE
United States Attorney

By: /s/ James W. Winchester
JAMES W. WINCHESTER
Assistant U.S. Attorney
323 United States Courthouse
1929 Stout Street
Denver, Colorado 80202
Telephone (303) 837-2065
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing ANSWER was served, addressed, to Akolt, Dick & Akolt, Attorneys for Plaintiffs, 1510 Lincoln Center Building, 1660 Lincoln Street, Denver, Colorado 80203, and deposited, postage prepaid, in the United States mail this 24th day of November, 1975.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 75-1000

ALLARD, ET AL., PLAINTIFFS

v.

KLEPPE, ET AL., DEFENDANTS

DEFENDANTS' FIRST INTERROGATORIES
TO PLAINTIFFS

In accordance with Rule 33 of the Federal Rules of Civil Procedure, the United States of America as defendant, requests plaintiffs to answer under oath, the following Interrogatories.

These Interrogatories are continuing Interrogatories. If at any time after service of the answers, and prior to the trial of this action, plaintiffs obtain additional information responsive to any of these Interrogatories which they are required to provide pursuant to Rule 26(e) of the Federal Rules of Civil Procedure, they shall, within 30 days, and in no event later than five days before trial, serve personally upon defendants' counsel named below supplemental sworn answers setting forth such additional information.

DEFINITIONS

1. "Plaintiffs" means each individual plaintiff in this matter. Where the interrogatory calls for responses which will be different for each plaintiff, set forth each response separately, together with the identity of the plaintiff making that response.

2. "Documents" includes correspondence, internal memoranda, summaries, minutes of meetings, notes, receipts, checks, announcements, and/or writings of any sort, made by or in possession of the plaintiffs.

INTERROGATORIES

1. With respect to paragraph IV of the Complaint:

(a) Identify and describe those artifacts which plaintiffs own which are composed of feathers from birds which plaintiffs believe may be subject to the Eagle Protection Act and the Migratory Bird Treaty Act.

(b) Identify, for each of the artifacts referred to in paragraph 1(a) above, by bird species, those feathers which plaintiffs believe may be subject to the Eagle Protection Act and the Migratory Bird Treaty Act.

(c) With reference to the allegation in the complaint ". . . but which birds were obtained prior to the effective date of Federal protection of such birds pursuant to the Eagle Protection Act and the Migratory Bird Treaty Act," identify with specificity the dates the "birds" were obtained and the method by which plaintiffs have ascertained those dates.

(d) Describe the basis upon which plaintiffs have ascertained the value of their artifacts to be in excess of $10,000, and the basis for plaintiffs' contention that such artifacts have no value if it is unlawful to trade or sell them.

2. With respect to paragraph VI. 2:

(a) Identify and describe those artifacts plaintiffs own which are composed of feathers from birds which plaintiffs believe may be subject to the Eagle Protection Act and the Migratory Bird Treaty Act.

(b) Identify, for each of the artifacts referred to in paragraph 2(a) above, by bird species, those feathers plaintiffs believe may be subject to the Eagle Protection Act and the Migratory Bird Treaty Act.

(c) With reference to the allegation ". . . but which birds were obtained prior to the effective date of Federal protection of such birds pursuant to the Eagle Protection Act and the Migratory Bird Treaty Act," state with specificity the dates the "birds" were obtained and the method by which plaintiffs have ascertained those dates.

(d) Describe the basis upon which plaintiffs have ascertained the value of their artifacts to be in excess of

$10,000, and the basis for plaintiffs' contention that such artifacts have no value of it is unlawful to trade or sell them.

3. With respect to paragraph IV. 3, describe the manner in which the Eagle Protection Act and the Migratory Bird Treaty Act restrict the ability of Denis C. Eros to engage in his lawful occupation and make it "impossible . . . to provide accurate appraisals of value of the artifacts above described" and the method used by the plaintiff Eros to calculate the injury to his business resulting from the statutes at issue.

4. With respect to paragraph IV. 4, specify how the Eagle Protection Act, the Migratory Bird Treaty Act, and the Regulations of the Department of the Interior restrict the ability of the plaintiff Kelley to engage in his "lawful occupation", and set forth the amount of damage to Kelley alleged to be the result of the aforesaid statutes and regulations, together with the method used to compute the damage asserted.

5. With respect to paragraph IV. 5:

(a) Identify those artifacts which plaintiffs own which are composed of feathers from birds which plaintiffs believe may be subject to the Eagle Protection Act and the Migratory Bird Treaty Act.

(b) Identify, for each of the artifacts referred to in paragraph 5(a) above, by bird species, those feathers which plaintiffs believe may be subject to the Eagle Protection Act and the Migratory Bird Treaty Act.

(c) With reference to the allegation ". . . but which birds were obtained prior to the effective date of Federal protection of such birds pursuant to the Eagle Protection Act and the Migratory Bird Treaty Act," identify with specificity the dates the "birds" were obtained and the method by which plaintiffs have ascertained those dates.

6. With respect to paragraph VI.A. 1, state whether plaintiffs:

(a) agree that the Act of June 20, 1936, was an amendment to the original Migratory Bird Treaty Act of July 3, 1918, 40 Stat. 755.

(b) dispute that the Supreme Court upheld the constitutionality of the original Act in *Missouri* v. *Holland*, 252 U.S. 416 (1920).

(c) claim the Act, as amended, is void on the basis of grounds other than those decided in *Holland* and state what those grounds are.

7. With respect to paragraph VI.A. 5, set forth in detail the factual basis, legal contentions, and legal authorities relied upon by the plaintiffs in asserting that the Migratory Bird Treaty Act and the Regulations are "illegal, unconstitutional, and without force of law as a deprivation of property without due process of law. . . ."

8. With respect to paragraph VI.B. 2, describe those feathers which are in plaintiffs' possession as artifacts or parts of artifacts previously identified by plaintiffs' answers to these interrogatories and which plaintiffs contend may be included, but are not specifically identified, by Article I, paragraph 2 of the United States-British Convention attached as Exhibit D to plaintiffs' complaint.

9. With respect to paragraph VI.B. 4, identify those species of birds which plaintiffs allege they are unsure are included in the Convention between the United States and Mexico (Exhibit E to plaintiffs' complaint) and state for each such species which artifacts, identified previously by plaintiffs in their answers to these interrogatories, contain feathers of that species.

In addition, state the factual basis upon which plaintiffs assert they are unsure the species identified in response to this interrogatory 9 are within the scope of the aforesaid Convention.

10. With respect to paragraph VI.B. 5, identify the "existing recognized systems of classification which conflict with respect to the family name of any particular species of birds. . . ."

11. With respect to paragraphs VI.C. 8 and 9, state in what way plaintiffs contend that the use of "families" rather than "species" has prejudiced them or made less clear the identification of birds covered by the Migratory Bird Treaty Act.

12. With respect to paragraph VII.1, state whether plaintiffs agree that the Amendment of October 23, 1972,

is a modification of the original Bald Eagle Protection Act (Acts of June, 1940 and October 24, 1962).

13. State the basis for plaintiffs' contention in paragraph VII. 4 that the Act and regulations thereunder do not apply to artifacts containing feathers of bald or golden eagles which were obtained prior to the effective date of the Act.

14. State separately the basis for plaintiffs' contention in paragraph VII.6 that (a) the Act, and (b) the regulations, are "arbitrary, capricious, and not rationally related to a legitimate regulatory purpose . . . ."

15. With respect to paragraph VII. 7, the plaintiffs assert that the name "golden eagle" is vague because it encompasses all "five recognized sub-species". State the basis for plaintiffs' contention that the term "golden eagle" is vague and "fails to apprise individuals of common intelligence of the nature of the proscribed conduct. . . ."

16. Identify and describe (or, if you will do so, attach copies to your answser) all documents in plaintiffs' possession which refer or relate in whole or in part to the acquisition of the artifacts previously identified in your answers to these interrogatories or to the sources from which plaintiffs acquired these artifacts.

17. For each artifact identified previously in these answers, state and give the basis for the statement, how the feathers of those birds believed by plaintiffs to be possibly within the Bald Eagle Protection and the Migratory Bird Treaty Act were obtained.

18. Have plaintiffs ever killed birds believed by them to possibly be within the scope of the Migratory Bird Treaty Act or the Bald Eagle Protection Act, and if the answer is affirmative, state the date and circumstances of each killing and the reason why the bird was killed.

19. Describe how the Bald Eagle Protection Act and the Migratory Bird Treaty Act have interfered with plaintiffs' enjoyment and use of their Indian artifacts, excluding the interference asserted by plaintiffs with their business.

20. Identify by name, business address and telephone number all expert witnesses plaintiffs intend to call at trial, and provide the following for each:

(a) the subject matter of the testimony
(b) the substance of the opinion and facts which will comprise the testimony
(c) a summary of the grounds for the opinion

JAMES L. TREECE
United States Attorney

/s/ Gary M. Jackson
GARY M. JACKSON

/s/ James W. Winchester
JAMES W. WINCHESTER
Assistant U.S. Attorneys
323 U.S. Court House
Drawer 3615
Denver, Colorado 80202
837-2065
Attorneys for Defendants

ADDENDA

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 76-1251

L. DOUGLAS ALLARD and CAROL S. ALLARD; PIERRE G. BOVIS and SYLVIA BOVIS; DENIS C. EROS; ALEXANDER G. KELLEY; and ROBERT G. WARD;
PLAINTIFFS-APPELLEES

vs.

KENT FRIZZELL, Solicitor of the Department of the Interior and Acting Secretary of the Interior; NATHANIEL REED, Assistant Secretary of the United States Fish and Wildlife Service, Department of the Interior; LYNN GREENWALT, Director of the United States Fish and Wildlife Service, Department of the Interior; and DR. CHARLES M. LOVELESS, Regional Director of Region 6, United States Fish and Wildlife Service, Department of the Interior; DEFENDANTS-APPELLEES

NATIONAL AUDUBON SOCIETY, INC.,
950 Third Avenue, New York
New York 10022, (212) 832-3200

ENVIRONMENTAL DEFENSE FUND, INC.,
162 Old Town Road, East Setauket,
New York 11733, (516) 751-5191,
MOVANTS-APPELLANTS

AFFIDAVIT

AFFIDAVIT OF DR. ALAN H. BRUSH

DR. ALLAN H. BRUSH, being duly sworn, deposes and says:

1. I am a professor in the Department of Zoology, University of Connecticut, located in Storrs, Connecticut, and am an expert in comparative biochemistry with par-

ticular regard to feather proteins, molecular evolution, and systematics.

2. I received my doctorate degree from the University of California, Los Angeles in 1964 and has been honored with fellowships to Cornell University, UCLA, and the University of California, Berkeley. I am a member of the following professional societies: American Association for the Advancement of Science, American Ornithologists' Union (Fellow), Cooper Ornithological Society, American Physiological Society, American Society of Zoologists, and the British Ornithologists' Union. I have authored or co-authored nearly fifty books, articles for scientific journals, monographs, and reviews in the area of my expertise. I have also been a recipient of the Marcia Brady Award of the American Ornithologists' Union and the Frances F. Roberts Award of the Cooper Ornithological Society.

3. My laboratory at the University of Connecticut, which receives continuous support from the National Science Foundation, is one of the only laboratories in the world studying the protein and pigment content of bird feathers. I have devoted the past three or four years to the study of the protein (keratin) content of feathers and have also worked for ten years with other aspects of feathers, including pigmentation and structure.

4. In my studies, I have necessarily been involved with the task of trying to date bird feathers as part of my research in keratin and carotenoids.

5. I can detect no change in the composition of fresh feather material and museum material removed from the skin of birds known, by museum records, to be over 100 years of age. In other words, I know of no good test for ascertaining whether a given feather is a century old or recently taken.

6. Decomposition in bird feathers is such a gradual process that existing scientific methods can detect no change for purposes of ascribing any particular age to feathers. Nor have scientists been able to detect morphological, color or pattern changes in feathers found in archeological digs known to be from the Seventh and Eighth Century A.D. as part of basket-weaver cultures existing in an area now known as the southwestern United States.

7. I have concluded that there is no available methodology of existing science that would permit the distinguishing of a fresh feather from an old feather to a time certain.

/s/ Alan H. Brush
ALAN H. BRUSH, PH.D.

Subscribed and sworn to before me, a Notary Public for the State of Connecticut, this 10th day of May, 1976.

/s/ Donna A. Jacob
Notary Public

My Commission expires: May 31st, 1978.

I, Howard K. Phillips, Clerk of the United States Court of Appeals for the Tenth Judicial Circuit and authorized custodian of the records of the Court, hereby certify that the foregoing four (4) pages constitute a full and true copy of the Affidavit of Dr. Alan H. Brush filed in appeal No. 76-1251, entitled L. Douglas Allard, et al. v. Kent Frizzell, et al., National Audubon Society, Inc., et al., Appellants, as the same as exists in the records in possession of the Clerk.

Witness my hand and seal of the Court in Denver, Colorado, this first day of October, 1976.

[SEAL]

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 75-W-1000

L. DOUGLAS ALLARD and CAROL S. ALLARD; PIERRE G. BOVIS and SYLVIA BOVIS; DENIS C. EROS; ALEXANDER G. KELLEY; and ROBERT G. WARD; PLAINTIFFS,

vs.

THOMAS S. KLEPPE, Secretary of the Interior; NATHANIEL REED, Assistant Secretary of the United States Fish and Wildlife Service, Department of the Interior; LYNN GREENWALT, Director of the United States Fish and Wildlife Service, Department of the Interior; and HARVEY WILLOUGHBY, Regional Director of Region 6, United States Fish and Wildlife Service, Department of the Interior; DEFENDANTS.

AFFIDAVIT

AFFIDAVIT OF LOREN KEITH PARCHER

LOREN KEITH PARCHER, being duly sworn, deposes and says:

1. I am the Deputy Chief of the Division of Law Enforcement, United States Fish and Wildlife Service, of the Department of the Interior, with offices in Washington, D.C. Pursuant to statutory authority and delegations of authority of the Department of the Interior, the Division of Law Enforcement is responsible for enforcing federal conservation laws for the protection and management of wild mammals, birds, fishes, amphibians, and reptiles, including enforcement of the Migratory Bird Treaty Act, 16 U.S.C. § 703 *et seq.* and the Eagle Protection Act, 16 U.S.C. §§ 668-668c.

2. Pursuant to the provisions of the Migratory Bird Treaty Act, the Eagle Protection Act and corresponding regulations under 50 C.F.R. §§ 21.2 and 22.2, the Fish and Wildlife Service has prosecuted persons involved in the marketing of feathers of protected birds, regardless of the date of acquisition or taking of such fathers.

3. Feathers taken or acquired before the effective date of the subject Acts and conventions cannot be the objects

of a registration system similar to that enacted to carry out the statutory exemptions for pre-Act marine mammals and their products under the Marine Mammal Protection Act, 16 U.S.C. § 1372(e), because:

a) The Migratory Bird Treaty Act, Eagle Protection Act, and regulations thereunder do not exempt pre-Act wildlife protected thereunder from prohibitions of the Act, as does the Marine Mammal Protection Act, except for possession and transportation;

b) The Eagle Protection Act and existing regulations under the Migratory Bird Treaty Act mandate that the Department of the Interior allow only possession and transportation of pre-Act bird feathers;

c) Upon information and belief, bird feathers cannot be dated so as to positively prove that a given feather was taken or acquired before federal protection was extended to certain birds under the subject Acts. This problem is compounded for artifacts that are composed of numerous, individual feathers, any one of which could as easily appear to be post-Act as pre-Act;

d) Given the morphology of feathers, they would be difficult to indelibly mark as permissible items for sale. Marking of each feather could involve damage to the feather or the structure of the Indian artifact itself. Control of permitted feathers attached to artifacts would be a corresponding problem because illegal feathers could be mixed with permitted feathers which are attached to an artifact, with little chance of detection.

/s/ Loren Keith Parcher
LOREN KEITH PARCHER

Subscribed and sworn to here before me, a Notary Public for the District of Columbia, this [illegible] day of September, 1976.

/s/ [Illegible]
Notary Public

My Commission expires: [Illegible]

ANSWER TO INTERROGATORY NO. 1(a)-(d)

NAME OF PLAINTIFF: Dennis C. Eros

1-(a), (b) The description of Plaintiffs' artifacts which Plaintiffs believe may be subject to the Eagle Protection Act and Migratory Bird Treaty Act identifying each, where known, the type of bird feathers are as follows:

1. Artifact: Hopi Kachina—Flicker feathers(?)
   Age: early 1940's Value: $300-$400
2. Artifact: Hopi Kachina—Feather type unknown
   Age: early 1940's Value: $400-$600
3. Artifact: Hopi Kachina—Feather type unknown
   Age: 1930's Value: $400-$600
4. Artifact: Hopi Kachina—Feather type unknown
   Age: 1920's Value: $400-$700
5. Artifact: Hopi Kachina—Feather type unknown
   Age: 1950's Value: $150-$250
6. Artifact: Hopi Kachina—Feather type unknown
   Age: early 1940's Value: $200-$300
7. Artifact: Zuni Kachina—Flicker feather (?)
   Age: 1920 Value: $200-$300
8. Artifact: Hopi Kachina—Feather type unknown
   Age: 1900-1910 Value: $700-$1,000
9. Artifact: Hopi Kachina—Parrot Feathers
   Age: 1890-1900 Value: $700-$1,000

9a. Artifact: Basket—Quail topknots
   Age: 1920-1930 Value: $300-$400

10. Artifact: 6 Sioux arrows—Eagle feathers (?)
   Age: 1939 Value: $50-$75 each

1-(c) Upon the Plaintiffs' belief, the dates the "birds" were obtained were prior to the estimated age of the artifact as stated. The method whereby the Plaintiffs as-

certained those dates for the age of the artifacts are as follows:

Expert Appraisal. Patina and style of manufacture.

1-(d) If such artifacts listed herein are unlawful to trade, sell or barter, Plaintiffs are unable to ascertain how such artifacts can have any value. The basis upon which the Plaintiffs have estimated the value of their artifacts is as follows:

Professional appraisal, similarity of sales, scarcity and visual appeal. Guides for pricing attached.—See attached answer.

16. Documents in Plaintiffs' possession relating to the acquisition of the artifacts identified herein are attached hereto or described as follows:

None.

17. Except as stated herein, Plaintiff is without information, knowledge or sources of information or knowledge to determine specifically how the feathers included within the artifacts were obtained. If known, such sources are as follows:

Attached.

18. Plaintiff has not killed birds believed by him to be possibly within the scope of the Migratory Bird Treaty Act or the Golden Eagle Protection Act except as follows, stating for each the date and circumstances of each killing and the reason why such bird was killed:

None.

These sheets attached to Plaintiffs' Answers to Defendants' First Interrogatories to Plaintiffs comprise the separate response requested in the Defendants' First Interrogatories to Plaintiffs, definitions Paragraph No. 1, and, in addition to such separate response, has reviewed the Plaintiffs' Answers to Defendants' First Interrogatories to Plaintiffs to which these sheets are attached and adopt such Answers as my response, except as follows:

Attached.

/s/ Denis Eros
Signature of Plaintiff

ANSWER TO INTERROGATORY NO. 1(a)-(d)

NAME OF PLAINTIFF: Robert G. Ward

1-(a), (b) The description of Plaintiffs' artifacts which Plaintiffs believe may be subject to the Eagle Protection Act and Migratory Bird Treaty Act identifying each, where known, the type of bird feathers are as follows:

1. Artifact: Ghost dance shield—muslin on wood frame containing nine Golden Eagle Feathers

Age: 1880 Value: $7,500.00

2. Artifact: Crow Medicine Pipe—wood, stone, beads w/3 own feathers, 3 eagle fluffs and various unidentifiable feathers.

Age: 1870 Value: $2,200.00

3. Artifact: Crow bustle—painted par flech hide and trade cloth panels, mirror in the middle. Contains approx. 20 eagle feathers and unknown feathers.

Age: 1900 Value: $2,500.00

4. Artifact: Plateau War Bonnet leather bead worked band with brass studs. Contains 24 Eagle Feathers

Age: 1800 Value: $650.00

5. Artifact: Crow Bustle—two trade cloth panels—decorated w/quill work w/approx. 30 Eagle Feathers and numerous feathers from unidentifiable birds

Age: 1910 Value: $2,300.00

6. Artifact: Southern Plains Dance Shield—painted par flech hide w/2 hide panels containing 1 bunch crow(?) feathers and 6 Eagle Feathers

Age: 1880 Value: $1,200.00

7. Artifact: Southern Plains Dance Shield—painted par flech w/2 hide panels. Top bound w/red trade cloth—contains 10 Eagle Feathers

Age: 1890 Value: $750.00

8. Artifact: Sioux Feathered War Bonnet—felt skull cap w/red trade cloth trailer contains 100 prairie chicken (?) tail feathers

Age: 1860 Value: $3,000.00

9. Artifact: Kiowa Ceremonial Fan—numerous twisted leather thongs containing 12 Eagle Feathers. The base of each being beaded.

Age: 1900 Value: $650.00

10. Artifact: Catlinte love flute (Kiowa) all natural lead and pipe stone construction with 2 Eagle Feather drops.

Age: 1870 Value: $400.00

1-(c) Upon the Plaintiffs' belief, the dates the "birds" were obtained were prior to the estimated age of the artifact as stated. The method whereby the plaintiffs ascertained those dates for the age of the artifacts are as follows:

> Having been an Indian Collector since age 3 as well as a dealer in artifacts for approx. 15 years I have bought and sold many Indian collections and collector items which required by expert ability in determining age and authenticity for business purpose.

1-(d) If such artifacts listed herein are unlawful to trade, sell or barter, Plaintiffs are unable to ascertain how such artifacts can have any value. The basis upon which the Plaintiffs have estimated the value of their artifacts is as follows:

> Most of the values are directly revelant to the price which I paid as part of the various collections they were obtained from. I have been generally recognized as one of 10 professional appraisers of antique Plains Indian material for about 10 years. Member of I.A.C.A. board of directors, Antique Appraiser Assoc. S.W.A.I.A. Board of Directors and others.

16. Documents in Plaintiffs' possession relating to the acquisition of the artifacts identified herein are attached hereto or described as follows:

Most if not all of the above artifacts have been acquired as part and particle of various old collections.

17. Except as stated herein, Plaintiff is without information, knowledge or sources of information or knowledge to determine specifically how the feathers included within the artifacts were obtained. If known, such sources are as follows:

Collections from which the previous items were obtained. Dr. Nollie Mumey—Denver Colorado 1969 (approx) Monroe P. Killy—Minneapolis, Minn. 1972 (approx) (portion Green Collection—New York) 1971 (approx.) Name unknown Peoria, Ill. 1968 (approx.)

18. Plaintiff has not killed birds believed by him to be possibly within the scope of the Migratory Bird Treaty Act or the Golden Eagle Protection Act except as follows, stating for each the date and circumstances of each killing and the reason why such bird was killed:

I have hunted and fished all of my life including numerous trips to Alaska as well as several other states and would never and have never entertained the thought of killing any protected species of bird or game animal.

These sheets attached to Plaintiffs' Answers to Defendants' First Interrogatories to Plaintiffs comprise the separate response requested in the Defendants' First Interrogatories to Plaintiffs, definitions Paragraph No. 1, and, in addition to such separate responses, has reviewed the Plaintiffs' Answers to Defendants' First Interrogatories to Plaintiffs to which these sheets are attached and adopt such Answers as my response, except as follows:

/s/ Robert G. Ward
Signature of Plaintiff

ANSWER TO INTERROGATORY NO. 1(a)-(d)

NAME OF PLAINTIFF: Lloyd D. and Carol S. Allard

1-(a), (b) The description of Plaintiffs' artifacts which Plaintiffs believe may be subject to the Eagle Protection Act and Migratory Bird Treaty Act identifying each, where known, the type of bird feathers are as follows:

1. Artifact: Flathead Medicine Mans Ward containing Numerous Hawk, Eagle and Owl Feathers

Age: Approx. 80 yrs. Value: 400.00

2. Artifact: Flathead War Bonnett—Containing Approx 30 Eagle Feather and some hawk and owl feathers

Age: Approx. 80 yrs. Value: 1,000.00

3. Artifact: Sioux War Bonnet with Trailer containing approx 80 Eagle Feathers

Age: Aprox. 80 yrs. Value: 1,500.00

4. Artifacts: Flathead War Bonnett containing approx 30 Eagle Feathers

Age: Approx. 80 yrs. Value: 800.00

5. Artifact: Flathead Bustle containing numerous Eagle, hawk and owl feathers

Age: Aprox. 60 yrs. Value: 600.00

6. Artifact: Flathead Fan containing approx. 6 Eagle Feathers

Age: Approx. 40 yrs. Value: 200.00

7. Artifact: War Bonnett containing approx. 30 Eagle Feathers

Age: Approx. 50 yrs. Value: $800.00

8. Artifact: Hawk Onnement Containing an eagle foot and several split eagle feathers

Age: Approx. 60 yrs. Value: $600.00

9. Artifact: Shield with three Eagle Feathers

Age: Approx. 50 yrs. Value: $1,500.00

10. Artifact: Hair Ornament containing a bird head and two Eagle Feathers

Age: Approx. 40 yrs. Value: 400.00

11. Split in war Bonnett containing numerous hawk, owl and Eagle feathers

Age: Approx. 80 yrs. Value: $1,500.00

12. War Bonnet containing approx. 30 Eagle Feathers

Age: Approx. 40 yrs. Value: $1,000.00

1-(c) Upon the Plaintiffs' belief, the dates the "birds" were obtained were prior to the estimated age of the artifact as stated. The method whereby the Plaintiffs ascertained those dates for the age of the artifacts are as follows:

By expert appraisal and in some cases by documented history of each piece and in some cases personal knowledge of owners family on my reservation.

1-(d) If such artifacts listed herein are unlawful to trade, sell or barter, Plaintiffs are unable to ascertain how such artifacts can have any value. The basis upon which the Plaintiffs have estimated the value of their artifacts is as follows:

Professional appraisal and prices received for similar items at Parke-Bennet, New York in auctions held during 1969 to 1973.

16. Documents in Plaintiffs' possession relating to the acquisition of the artifacts identified herein are attached hereto or described as follows:

None

17. Except as stated herein, Plaintiff is without information, knowledge or sources of information or knowledge to determine specifically how the feathers included within the artifacts were obtained. If known, such sources are as follows:

Unknown

18. Plaintiff has not killed birds believed by him to be possibly within the scope of the Migratory Bird Treaty Act or the Golden Eagle Protection Act except as follows, stating for each the date and circumstances of each killing and the reason why such bird was killed:

None, except for licensed duck hunting a number of years ago.

These sheets attached to Plaintiffs' Answers to Defendants' First Interrogatories to Plaintiffs comprise the separate response requested in the Defendants' First Interrogatories to Plaintiffs, definitions Paragraph No. 1, and, in addition to such separate responses, has reviewed the Plaintiffs' Answers to Defendants' First Interrogatories to Plaintiffs to which these sheets are attached and adopt such Answers as my response, except as follows:

/s/ Lloyd D. Allard
Signature of Plaintiff

/s/ Carol S. Allard
Signature of Plaintiff

ANSWER TO INTERROGATORY NO. 1(a)-(d)

NAME OF PLAINTIFF: PIERRE G. BOVIS

1-(a), (b) The description of Plaintiffs' artifacts which Plaintiffs believe may be subject to the Eagle Protection Act and Migratory Bird Treaty Act identifying each, where known, the type of bird feathers are as follows:

1. Artifact: Mandan Horned Single Trail Bonnet—Golden Eagle feathers, Owl Feathers, Beadwork and Bells.

Age: 1850 Value: $1,800.00

2. Artifact: Sioux Single Trail Horned Bonnet—Eagle Wing feathers, beaded headband.

Age: C 1900 Value: $1,000.00

3. Artifact: Sioux Double Trailer Eagle Feather Bonnet—Golden Eagle feathers, beaded band, and ribbon decoration.

Age: C 1900 Value: $2,000.00

4. Artifact: Sioux Double Trailer Bonnet—Golden Eagle Feathers. Beaded headband and various decorations.

Age: C 1900 Value: $2,000.00

5. Artifact: Sioux Bustle, Golden Eagle Feathers—Decorated with Felt, Mirror and Bells.

Age: C 1890 Value: $850.00

6. Artifact: Sioux Single Trailer Bonnet, Beaded Strip—Golden Eagle Feathers.

Age: C 1900 Value: $1,500.00

7. Artifact: Sioux Horned Single Trailer Bonnet—Golden Eagle Feathers and Beaded Headband.

Age: C 1890 Value: $1,500.00

8. Artifact: Crow Bustle, Golden Eagle Feathers—Yarn, Ribbon, Beaded rosettes.

Age: C 1880 Value: $750.00

9. Artifact: Sioux Eagle Feather Banner—Golden.

Age: C 1900 Value: $300.00

10. Artifact: Sioux Fan made of Golden Eagle Feathers—Buckskin with Beaded Handle.

Age: C 1900 Value: $250.00

1-(c) Upon the Plaintiffs' belief, the dates the "birds" were obtained were prior to the estimated age of the artifact as stated. The method whereby the Plaintiffs ascertained those dates for the age of the artifacts are as follows:

> As I am a professional appraiser and I am regarded as an expert on Plains material by many other collectors dealers and museums I feel secure in stating the age on those items.

1-(d) If such artifacts listed herein are unlawful to trade, sell or barter, Plaintiffs are unable to ascertain how such artifacts can have any value. The basis upon which the Plaintiffs have estimated the value of their artifacts is as follows:

> This type of item has been traded, bartered and sold by traders and dealers for about a century and has never been recognized as "illegal" material—even public auctions in recent years offered these items publicly and sold them with no recriminations until a couple of years ago. So this is how we come up with a value.

16. Documents in Plaintiffs' possession relating to the acquisition of the artifacts identified herein are attached hereto or described as follows:

> These items were on consignment to me from various private collectors—as I felt secure about them and did not believe the law was meant to be retroactive! I offered them for sale and was arrested for this act. They are historical pieces in my opinion. These have been returned to their owners until the law is amended.

17. Except as stated herein, Plaintiff is without information, knowledge or sources of information or knowl-

edge to determine specifically how the feathers included within the artifacts were obtained.

> I feel that I have enough experience to ascertain origin, (tribal) and age of this type of historical artifact. If known, such sources are as follows:
>
> Original sources—they were all made by AMERICAN INDIANS over a century ago or at turn of century.

18. Plaintiff has not killed birds believed by him to be possibly within the scope of the Migratory Bird Treaty Act or the Golden Eagle Protection Act except as follows, stating for each the date and circumstances of each killing and the reason why such bird was killed:

> I am not a hunter and have never killed a bird. I have never killed any animal of any kind for personal or business reasons.

These sheets attached to Plaintiffs' Answers to Defendants' First Interrogatories to Plaintiffs comprise the separate response requested in the Defendants' First Interrogatories to Plaintiffs, definitions Paragraph No. 1, and, in addition to such separate responses, has reviewed the Plaintiffs' Answers to Defendants' First Interrogatories to Plaintiffs to which these sheets are attached and adopt such Answers as my response, except as follows:

> No further comments—I believe my point is very clear and I believe that historical items should be preserved and laws should be enforced for violation of living birds and animals of this present time. Leave alone items made a century ago and citizens rights should not be violated further in respect to genuine artifacts.

/s/ Pierre G. Bovis
Signature of Plaintiff

/s/ Sylvia Bovis
Signature of Plaintiff

SUPREME COURT OF THE UNITED STATES

No. 78-740

CECIL D. ANDRUS, Secretary of the Interior, ET AL., APPELLANTS

v.

L. DOUGLAS ALLARD, ET AL.

APPEAL from the United States District Court for the District of Colorado.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

February 21, 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 289738 368

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1978

NO. 78-740

CECIL D. ANDRUS, SECRETARY of the INTERIOR, ET. AL., Appellants

v.

L. DOUGLAS ALLARD, ET. AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

MOTION TO AFFIRM

John P. Akolt, Jr.
John P. Akolt, III
1510 Lincoln Center
1660 Lincoln Street
Denver, Colorado 80264

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IN THE SUPREME COURT

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OCTOBER TERM, 1978

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v.

L. DOUGLAS ALLARD, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

MOTION TO AFFIRM

Appellants' Jurisdictional Statement presents the anomalous position of demonstrating the "substantial nature of the questions presented" (Jurisdictional Statement, Page 8) while premising the Statement upon the position that "substantial questions" do not exist.

In presenting this Motion, Appellees intend not to brief nor answer the substantive argument of the Appellants relating to the merits of the decision on appeal, but desire that this Court note its probable jurisdiction pursuant to 28 U.S.C. §1253 and affirm the decision on appeal from the United States District Court for the District of Colorado as being manifestly correct.

I. THIS COURT HAS JURISDICTION FOR DIRECT APPEAL AS SUBSTANTIAL CONSTITUTIONAL QUESTIONS WERE PRESENTED AND A THREE-JUDGE PANEL FOR THE DISTRICT COURT OF THE DISTRICT OF COLORADO WAS PROPERLY CONVENED.

Appellants' statement that "If this Court has jurisdiction, the questions are substantial" (Jurisdictional Statement, Page 8) is a truism to which there can be no objection. Appellees urge, however, that this Court note its probable jurisdiction <u>because</u> substantial constitutional questions have been presented and a three-judge District Court panel was therefore required and properly convened pursuant to 28 U.S.C. §2282.

Plaintiffs are the owners of, dealers in, and appraisers of American Indian artifacts,

which artifacts are comprised in part of the feathers of various birds now included within the protection of the Migratory Bird Treaty Act, 16 U.S.C. §703, et seq, and Eagle Protection Act, 16 U.S.C. §668 (hereafter "Acts"). The artifacts were created and lawfully owned prior to the effective date of Federal protection of birds within the Acts.

Two of the Plaintiffs have previously been criminally prosecuted under the Acts for the sale or offering for sale of their pre-existing American Indian artifacts. Each of the Plaintiff's personal collection of feathered Indian artifacts has a value in excess of $10,000.00 and, in fact, such collections represent the culmination of each Plaintiff's professional career of collecting and dealing in American Indian art.

Appellees' ownership of American Indian art and lawful occupations of dealing in American Indian artifacts have been substantially eliminated by the broad enforcement and interpretation of the Acts by the Appellants, the United States Fish and Wildlife Service and the Department of the Interior.

The Acts, as enforced and interpreted by the Appellants, have proscribed <u>all</u> valuable uses of the Appellees' property and have the effect of outlawing a substantial part of the native

cultural heritage of this country. Private sales and exchange are outlawed and collecting is, therefore, essentially a prohibited activity. Museums and public institutions are similarly limited in their actions as private owners cannot sell or exchange their collections.

The constitutional challenges of the Acts brought by the Appellees were the following:

1. As all valuable uses of the property of the Plaintiffs have been denied by the Appellants and as each of the Appellee's lawful occupation was restricted by the Department of the Interior, the Acts were challenged as "taking" of property without compensation under the Fifth Amendment to the Constitution of the United States.

2. The Acts and regulations which, at the time of the filing of this action, did not define the birds which were within the protection of the Acts, were challenged as vague and indefinite statutes in violation of the Fifth Amendment to the Constitution of the United States.[1]

[1]Appellees' Complaint was filed September 19, 1975, at which date Title 50 of the Code of Federal Regulations, Part 10, was not a definitive list of the birds within the protection of the Migratory Bird Treaty Act. Substantial questions due to the variation and indefiniteness of the ornithological terms utilized by the treaties and conventions as the operative terms of the Acts were presented. By amendment to Part 10, Title 50 of the Code of Federal Regulations effective November 17, 1977, the vagueness, and ambiguity of the identity of protected birds was clarified. The claim of vagueness, having been satisfied by the definity of the revised Regulations of November 17, 1977, was not presented for the consideration of the District Court and is not an issue on appeal.

As the Appellees did not believe that the Acts themselves applied to pre-existing artifacts and recognizing the judicial principal of interpreting an act so as to avoid the necessity of determining a constitutional challenge, the Appellees additionally urged that the Acts be interpreted so as to apply prospectively from the date of enactment and not be applied to pre-existing, lawfully acquired, and valuable property. Inclusion of the non-constitutional ground does not impair the jurisdiction of the three-judge court to hear the case nor the direct appellate jurisdiction of the United States Supreme Court. Florida Lime and Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 4 L.Ed.2d 568, 80 S.Ct. 568 (1960).

Injunctive relief prohibiting the enforcement of the Acts against the property of the Appellees was sought and a permanent injunction has issued.

"Constitutional insubstantiality" for the purpose of noting probable jurisdiction on appeal from a three-judge panel has been equated with such concepts as "essentially fictious", "wholly insubstantial", "obviously frivolous", and "obviously without merit." Goosby et al v. Osser

et al, 409 U.S. 512, 35 L.Ed.2d 36, 93 S.Ct. 854 (1973). The challenges of the Appellees whose property has been rendered valueless and whose professional careers have been limited cannot be characterized as having presented constitutional questions which were "insubstantial."

Citing earlier decisions, this Court in Goosby, supra, at page 518, has further stated that a claim is insubstantial only if

> "'"Its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and to leave no room for the inference that the questions sought to be raised can be the subject of controversy."'"

No decision of this Court has determined the constitutionality of the Acts if applied to previously existing and lawfully acquired American Indian artifacts, nor has this Court considered the constitutional application of similar conservation acts as such acts may relate to pre-existing materials (Acts such as the Marine Mammal Protection Act, 16 U.S.C. §1361, et seq., to be sure, provide for the exclusion of pre-existing materials or provide for permits for pre-existing artifacts and thus are fundamentally distinguished from the Acts in question).

Appellants do not deny that all valuable uses left to the Appellees' property are foreclosed by enforcement of the Acts and

continue to assert that such destruction of value is the intent of the Acts so as to preserve existing wildlife from illegal takings (Jurisdictional Statement, Pages 12-13).

Destruction of all of the value of the Appellees' property and limitation of their professional careers presents a catastrophic loss to the individuals involved and cannot be deemed frivolous.

That two of the Appellees have been prosecuted under the Acts for the sale of pre-existing American Indian artifacts and that the threat of continued prosecutions is presented if the Acts were to be upheld as interpreted by the Appellants manifests that substantial questions as to the constitutionality of the Acts are presented. Gunn, et al v. University Committee to End the War in Viet Nam, et al, 399 U.S. 383, 26 L.Ed.2d 684, 90 S.Ct. 2013 (1970); see also Annotation, 'CONSTRUCTION AND APPLICATION OF 28 U.S.C. §1253 PERMITTING DIRECT APPEAL TO SUPREME COURT FROM ORDER OF THREE-JUDGE DISTRICT COURT GRANTING OR DENYING INJUNCTION', 26 L.Ed.2d 947.

The continued interpretation and expansion of the Acts to include pre-existing artifacts notwithstanding judicial precedent directly contrary and no precedent supporting the Appellants, provides further evidence of the

substantial nature of the questions presented and the necessity for the injunctive relief sought by the Appellees and granted by the Court. The four cases referred to are:

1. Informations, In re Under Migratory Bird Treaty Act, 281 F.546 (D. Mont. 1922);

2. United States v. Fuld Store Company, 262 F.836 (D. Mont 1920);

3. United States v. Marks, 4 F.2d 420 (SD.Tex.1925);

4. United States v. Aitson, (10th Cir. unpublished, July 21, 1975, No. 74-1588).

See also A. E. Nettleton Co. v. Diamond, 315 NY.Sup.2d 625, 264 N.E.2d 118 (1970), appeal dismissed 401 U.S. 969 (1971).

Finally, in determining whether substantial constitutional questions have been raised concerning the "taking" of valuable property rights of the Appellees, the difficulty of determining the appropriate test for when "justice and fairness" require that economic injuries caused by public action be compensated by the Government rather than remaining disproportionally concentrated on a few persons has been recently expressed by this Court in Penn Central Transportation Co., et al, v. City of New York, et al, 46 LW 4856 (June 26, 1978, No. 77-444). See also Goldblatt v. City of Hempstead 369 U.S. 590, 8 L.Ed.2d 130, 82 S.Ct. 987

(1962). The determination depends largely upon the particular circumstances of the case presented and must be resolved on an ad hoc basis.

The lawful acquisition of pre-existing American Indian artifacts by the Appellees is not an issue. The destruction of all value of Appellees' property by the enforcement of the Acts is admitted. The catastrophic impact of the Acts upon the property and livelihood of the Appellees has been established. The necessity of seeking declaratory and injunctive relief to effectuate prior judicial determinations against the contrary enforcement of the Acts by the Appellants is apparent.

There being no prior judicial determination from this Court concerning the constitutionality of the Acts as related to valuable pre-existing American Indian artifacts nor any similar determination pursuant to other conservation acts, and the judicial test of "fairness" to be determined by the circumstances of each case, all suggest that "substantial" constitutional questions have been presented.

This Court should, therefore, note its probable jurisdiction on appeal pursuant to 28 U.S.C. §1253.

II. THE DECISION OF THE THREE-JUDGE PANEL OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO SHOULD BE AFFIRMED ON THE GROUNDS THAT IT IS MANIFESTLY CORRECT.

The District Court construed the Acts so as to apply prospectively from the date of enactment. The decision is based upon prior judicial precedent (Opinion, Appendix A, Jurisdictional Statement, Pages 6a-8a); balancing the reasonable necessity of the drastic measures urged by the Appellants against the impact falling upon the Appellees (Opinion, Appendix A, Jurisdictional Statement, Pages 11a-13a); reviewing the confiscatory effect upon the Appellees' property, if given the scope urged by the Appellants (Opinion, Appendix A, Jurisdictional Statement, Pages 12a-13a); considering the legislative intent in re-enacting the Acts following judicial constructions that the Acts applied only to birds and parts thereof taken after Federal protection had been afforded (Opinion, Appendix A, Jurisdictional Statement, Pages 12a-13a); and adopting the accepted judicial standard of construing a statute so as to avoid the necessity of determining the constitutional challenge that otherwise is presented (Opinion, Appendix A, Jurisdictional Statement, Page 13a). The determination of the District Court in construing the Acts not to

apply retrospectively is manifestly correct and should be affirmed.

The language of the Migratory Bird Treaty Act, particularly, demonstrates that lawfully acquired feathered American Indian artifacts are not within the proscription of the Act.

Section 2 of the Migratory Bird Treaty Act, as amended, 16 U.S.C §703 (Jurisdictional Statement, Appendix A, Page 23a) does not itself define protected birds, but refers instead to the various treaties between the United States and foreign countries. The Convention between Japan and the United States concluded March 4, 1972 (25 U.S.C. §3329), contrary to the statement of Appellants at page 15 of the Jurisdictional Statement, specifically restricts the inclusion of protected birds and bird products to those which have been "taken illegally." Article III, Section 1, of the Convention provides:

> "The taking of the migratory birds or their eggs shall be prohibited. Any sale, purchase, or exchange of these birds or their eggs, taken illegally, alive or dead, and any sale, purchase, or exchange of the products thereof or their parts shall also be prohibited." [Emphasis Supplied.]

By adopting the Convention as the operative term of the Migratory Bird Treaty Act, Congress has specifically restricted the inclusion of the Act relating to the Convention with Japan to

parts of birds which were taken illegally after the effective date of Federal protection.

The specific language and the legislative history of the re-enactment of the Migratory Bird Act in 1974 similiarly show that it was not the legislative intent of Congress to include historic American Indian artifacts within the Act.

Mr. Nathanial Reed, Assistant Secretary of the Interior, a party Appellant, provided the official agency comment of the Department of the Interior, for the consideration of the Committee on Commerce relating to the 1974 amendment to the Migratory Bird Act:

> "The Convention contains a provision that prohibits the taking of migratory birds or their eggs. It also prohibits the sale, purchase, or exchange of these birds or their eggs, taken illegally, alive or dead, and the products thereof or their parts. Neither the Migratory Bird Treaty Act nor the bill as introduced, contained language prohibiting the taking, sale, purchase or exchange of products therefrom. Consequently, H.R. 10942 was amended by the House to make it clear that the prohibition applied also to any product of any such bird, egg or part thereof." [Emphasis Supplied.] U.S. Code, Congressional and Administrative News, 93rd Congress--Second Session, 1974, Vol.2, p. 3254.

The Senate report for Public Law 93-851, the

1974 amendment to the Migratory Bird Treaty Act, set forth identical construction with that stated by Mr. Reed. (U.S. Code, Congress. and Admin. News, supra at p. 3250.)

In amending and re-enacting the Act following judicial construction limiting the Acts' applicability relating to pre-existing property and as the Acts themselves do not specifically include pre-existing property, it is to be presumed that the legislature was familiar with the existing construction and enacted the statutes in light of the judicial precedent. See Blake v. McKim, 103 U.S. 336, 26 L.Ed. 563, 13 Otto 336; District of Columbia v. Murphy, 314 U.S. 441, 86 L.Ed. 329, 62 S.Ct. 303.

The Appellants' citations of U.S. v. Richards, 583 F.2d 491 (10th Cir. August 23, 1978, No. 77-1603); United States v. Species of Wildlife, 404 F.Supp. 1398 (E.D. NY 1975); and United States v. Kepler, 531 F.2d 796 (6th Cir., 1976) ; not only fail to support the intended position that the questions presented in this action have been foreclosed by other decisions and are therefore no longer "substantial questions", but such cases are fundamentally distinguished from the circumstances presented.

Richards, supra, a decision of the United States Court of Appeals, 10th Circuit, was decided subsequent to the determination of the

District Court in this action. Richards itself distinguishes the decision therein provided from the panel's determination in this action. The limited property rights acquired by the defendent Richards who obtained his living birds pursuant to permits not providing for subsequent sale is fundamentally distinguished from having lawfully acquired property rights without permit or limitation and which rights are thereafter foreclosed.

In Kepler, supra, the United States Court of Appeals, Sixth Circuit, carefully delimited the scope of the Endangered Species Act of 1973 therein being considered as not extending to intrastate sales. As obvious value was thus left to the defendant Kepler, the restriction on interstate sales and foreign commerce is essentially distinguished from the Acts in this case which foreclose all sales, thus creating a confiscatory effect not present in Kepler.

In Species of Wildlife, supra, the Court referred to a permit system which could have been availed upon by the owner of the confiscated specimen. The Acts in this action, as enforced by the Appellants, do not provide for any commercial permits.

In each of the cases cited by the Appellants, the inquiry of the Court has ascertained that through exceptions, exclusions,

permits or due to limitations on the rights of owners existing prior to the acquisition of property, "takings" were avoided and the statutes enforced.

The District Court panel, as noted, adopted the judicial constraint of interpreting the Acts so as to avoid the necessity of condemning them as unconstitutional. See United States v. Johnson, 323 U.S 273, 89 L.Ed. 236, 65 S.Ct. 249 (1944); Regional R il Reorganization Act cases, 419 U.S. 102, 42 L.Ed.2d 320, 95 S.Ct. 335 (1974). If such a construction, permitting reasonable regulations to be adopted, were not approved, the invalidity of the Acts as "takings" of property in violation of the Fifth Amendment to the United States Constitution, could not be avoided.

Paralleling the tests suggested by this Court in Penn Central Transportation Company, et al., supra, the constitutional invalidity of the Acts if applied to pre-existing artifacts is established.

In Penn Central, the owner of the property was left numerous valuable options:

1. A "reasonable rate of return" on the property was to be permitted.

2. An administrative process for allowing desired uses or in some instances permitting exemptions due to hardship was available.

3. Development rights allocated to the restricted property could be transferred to other properties of the owner and value realized.

The restrictions upheld in Penn Central were therefore consistent with previous zoning determinations that, while the most valuable use of property can be prohibited without compensation, some valuable uses must be permitted to remain.

The Acts in question in this action are intended to and do prohibit all valuable uses of whatever nature for the property of the Appellees; Appellees' ability to dispose of their property for any value whatever has been denied.

The Appellees have acquired and dealt in collections of American Indian artifacts with distinct investment-backed expectations. Acquiring and disposing of such artifacts is, indeed, their entire professional life. The economic impact of the Acts upon the property and rights of the Appellees is thus of particular significance.

The Acts prohibit the disposition of the Appellees' property for any value whatever. This critical distinction is contrary to one of the fundamental reservations of property rights considered by this Court in Goldblatt, supra.

The property of the Appellees has been made "wholly useless" placing the Acts within the

condemnation of Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 67 L.Ed. 322, 43 S.Ct. 158 (1922), and Hudson Water Co. v. McCarter, 209 U.S. 349, 52 L.Ed. 828, 28 S.Ct. 529 (1908)

The Acts in question have as their laudible goal, the preservation of existing wildlife. Appellees do not challenge that their aim is for a proper public purpose, nor do Appellees claim any right whatsoever in owning or dealing in any bird or bird product taken illegally. The Appellees make no claim that they should be permitted to be free from reasonable permits or regulations such as those provided by similiar wildlife conservation acts exemplified by the Marine Mammal Protection Act, supra.

If the Acts are found to apply to lawfully acquired pre-existing artifacts, however, traditional notions of "justice and fairness" require that the economic injury caused by the public action not remain concentrated on the few, but such disporportionate affect be distributed among all by way of fair compensation, if the public purpose could not be realized through less drastic regulation.

CONCLUSION

The Court should note its probable jurisdiction for the appeal from the District Court for the District of Colorado and affirm the

decision as manifestly correct.

RESPECTFULLY SUBMITTED,

AKOLT, DICK AND AKOLT

John P. Akolt, Jr.

John P. Akolt, III

DECEMBER 1978

No. 78-740

In the Supreme Court of the United States

OCTOBER TERM, 1978

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL., APPELLANTS

v.

L. DOUGLAS ALLARD, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR THE APPELLANTS

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BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1a-15a) is not yet reported.

JURISDICTION

This case was decided by a three-judge district court convened under 28 U.S.C. (1970 ed.) 2282. Judgment was entered on June 7, 1978 (J.S. App. 16a-17a). A notice of appeal to this Court was filed on July 5, 1978 (J.S. App. 18a-19a). On

September 12, 1978, Mr. Justice White extended the time for docketing the appeal to and including November 2, 1978, and the appeal was docketed on that date. On February 21, 1979, this Court noted probable jurisdiction (A. 61). This Court's jurisdiction is invoked under 28 U.S.C. 1253.

QUESTION PRESENTED

Whether the Secretary of the Interior has authority under the Eagle Protection Act and the Migratory Bird Treaty Act to forbid commercial transactions in birds and parts of birds that were lawfully killed prior to the date the species came under federal protection.

STATUTES AND REGULATIONS INVOLVED

Sections 1 and 2 of the Eagle Protection Act, 16 U.S.C. 668 and 668a; Sections 2, 3, and 12 of the Migratory Bird Treaty Act, 16 U.S.C. 703, 704, and 711; and pertinent regulations of the Secretary of the Interior, 50 C.F.R. 22.2(a) and 50 C.F.R. 21.2(a), are set forth in J.S. App. 20a-25a.

STATEMENT

1. Although the bald eagle has been protected by the Eagle Protection Act (16 U.S.C. 668 *et seq.*) since 1940, it remains an endangered species throughout most of the 48 coterminous states (43 Fed. Reg. 6230 (1978)). Even in the Northwest and the upper Great Lakes Region, where the bald eagle is most frequently found, it is a threatened species (*ibid.*).

Surveys conducted by the Fish and Wildlife Service in 1974 and 1975 showed only 318 active nests throughout Minnesota, Wisconsin, and Michigan, 103 active nests in Washington, and 63 in Oregon.[1] Although the bald eagle's range covers the entire country (*id.* at 6231), the surveys showed only 232 active nests in the entire southern half of the country (below the 40° N. parallel).[2] This precarious situation is in part due to the widespread loss of siutable habitat, but the Service reports that "[s]hooting continues to be the leading cause of direct mortality in adult and immature bald eagles, accounting for about 40 to 50% of birds picked up by field personnel" (*id.* at 6232).[3]

In enacting the Eagle Protection Act in 1940, Congress attempted to protect this country's eagle population by imposing stringent restrictions on the taking of eagles, coupled with a total prohibition on commercial transactions in the birds (16 U.S.C. 668). Section 1 of the Act (16 U.S.C. 668) makes it un-

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[1] The reproduction rate in these areas is apparently better than in the rest of the country, perhaps because the eagles there are in closer proximity to the larger populations that survive in Alaska and Canada (43 Fed. Reg. 6230 (1978)).

[2] One hundred and fifty of these nests were in Florida. North of the 40th parallel, there were 16 nests in California, 33 in Maine, and 26 in all the rest of the coterminous states outside the Northwest and upper Great Lakes region. 43 Fed. Reg. 6231 (1978).

[3] The Fish and Wildlife Service reports that there were 208 investigations under the Eagle Protection Act pending on December 31, 1978. The great majority of these involved the killing of bald and golden eagles; others involved commercial violations.

lawful—and subject to a maximum penalty of $10,000 and two years' imprisonment—to knowingly or wantonly possess, take, buy, sell, barter, or transport any bald eagle or golden eagle,[4] alive or dead, "or any part, nest, or egg thereof," except as permitted by the Act.[5] The Act authorizes the Secretary of the Interior to permit "the taking, possession, and transportation of [eagles]" for the scientific or exhibition purposes of public museums, scientific societies, and zoological parks, or for the religious purposes of Indian tribes, or as necessary to protect wildlife or agricultural interests, but only when he has determined, after investigation, that such taking "is compatible with the preservation of the bald eagle or the golden eagle." 16 U.S.C. 668a.[6]

The Act contains no authorization to the Secretary to permit the purchase, sale, or barter of any eagles or their parts. It does provide, however, that nothing

[4] The Act originally applied only to bald eagles. It was amended in 1962 to cover golden eagles as well. Although not quite so scarce as bald eagles, golden eagles are also threatened with extinction, and are difficult to distinguish from bald eagles before maturity. S. Rep. No. 1986, 87th Cong. 2d Sess. 6 (1962); 76 Stat. 1246.

[5] Each taking or other prohibited act with respect to a single eagle constitutes a separate offense (16 U.S.C. 668(a)). A civil penalty of up to $5,000 is also provided for each violation of the Act; neither a knowing nor a wanton violation need be shown for assessment of the civil penalty. Compare 16 U.S.C. 668(b) with 16 U.S.C. 668(a).

[6] In addition, the Secretary may permit the taking, transportation, and possession for falconry of golden eagles that would otherwise be subject to taking because of depredations on wildlife or livestock (16 U.S.C. 668a). See also the Fish and Wildlife Improvement Act of 1978, Pub. L. No. 95-616, Section 9, 92 Stat. 3114-3115.

in the Act prohibits the "possession or transportation" of eagles or their parts that were lawfully taken before the Act applied to them. 16 U.S.C. 668(a). The Secretary of the Interior's regulations, 50 C.F.R. 22.2(a), implement this proviso. They state that eagles or parts of eagles lawfully acquired before the date they came under the Act's protection "may be possessed or transported" without a permit issued under the Act, "but may not be imported, exported, purchased, sold, traded, [or] bartered * * *."[7]

The Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. 703 *et seq.*, reflects a similar congressional concern about the possible extinction of many other species of migratory birds,[8] most of which fortunately have not reached the precarious condition of the bald eagle.[9] The MBTA was originally enacted

[7] The original regulations, promulgated in April 1941, provided that "no bald eagles, parts thereof, mounted specimens, or nests or eggs thereof may be purchased, sold or offered for sale in the United States * * * [but] [b]ald eagles, * * * [or] any parts thereof * * * lawfully acquired prior to June 8, 1940, may be possessed or transported without a Federal permit" (Section 6.1(a) and (c), 6 Fed. Reg. 1966 (1941)). The current phrasing of the prohibition was first used when the regulations were amended to reflect the extension of the Act's protections to the golden eagle, 28 Fed. Reg. 975 (1963).

[8] The almost 200 species of birds to which the MBTA now applies are identified by common and scientific name in 42 Fed. Reg. 59358-59362 (1977).

[9] Some have. The Fish and Wildlife Service reports that the population of American peregrine falcons in the 48 coterminous states has dopped to about 150 nesting pairs, and the species is now listed as endangered (50 C.F.R. 17.11). Illegal hunting of migratory birds is an increasing problem. The

in 1918, to implement the terms of a treaty between the United States and Great Britain to protect identified species of birds whose annual migrations cross our border with Canada (40 Stat. 755); H.R. Rep. No. 243, 65th Cong., 2d Sess. (1918). See *Missouri v. Holland*, 252 U.S. 416 (1920). It was amended in 1936 (Convention between the United States and Mexico, February 7, 1936, 50 Stat. 1311, T.S. No. 912) and 1974 (88 Stat. 190) and 1978 (Pub. L. No. 95-616, 92 Stat. 3112) to reflect the conclusion of similar treaties with Mexico, Japan, and the Soviet Union.[10] All four treaties express the concern of the contracting nations that the species of birds to which the treaties apply are threatened (Convention between the United States and Great Britain, August 16, 1916, 39 Stat. 1702, T.S. No. 628; Treaty with Mexico, 50 Stat. 1311; Convention between the United

Fish and Wildlife Service reports 2,454 investigations under the MBTA pending on December 31, 1978, compared with 439 pending on June 30, 1975.

[10] Additional species came within the MBTA when they were brought under the Mexican treaty in 1972 by an agreement pursuant to Article IV of the treaty (Exec. Order No. 11629, 36 Fed. Reg. 20647 (1971); letter of March 10, 1972 of U.S. Ambassador to Mexico (23 U.S.T. 260, T.I.A.S. No. 7302)). The Fish and Wildlife Improvement Act of 1978, Pub. L. No. 95-616, 92 Stat. 3110, authorizes the Secretary to issue regulations implementing the treaty with the Soviet Union for the conservation of migratory birds and their environment concluded on November 19, 1976 (92 Stat. 3112). No such regulations have been issued to date.

States and the Soviet Union, November 19, 1976, 7 Envir. L. Rep. 40318).

The MBTA in terms applies to "any migratory bird [or] any part, nest, or eggs of any such bird, or any product, whether or not manufactured, which consists, or is composed, in whole or part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions between the United States" and Great Britain, Mexico and Japan. 16 U.S.C. 703.[11] Like the Eagle Protection Act, the MBTA makes it unlawful to take, possess, buy, sell, barter, or transport any bird to which it applies, or any part thereof, except as permitted by the Act (16 U.S.C. 703). It also authorizes the Secretary of the Interior to issue permits for activities otherwise prohibited, but gives him greater discretion in determining which activities to allow. Thus, the Secretary may, after considering specified statutory factors,[12] "determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, * * * possession, sale, purchase, [or] shipment" of covered birds or their parts. 16 U.S.C. 704. Although the MBTA contains no specific exemption for birds or parts acquired before they were protected by the Act, the Secretary has exercised his discretion under the Act

[11] The reference to products was included for clarification when the Act was amended in 1974 (H.R. Rep. No. 93-936, 93d Cong. 2d Sess. 2 (1974)).

[12] These factors include the "distribution, abundance, economic value, breeding habits," and migratory flight patterns of the birds involved (16 U.S.C. 704).

to provide an exemption similar to that in the Eagle Protection Act for the possession and transportation of birds and parts of birds legally acquired before they were covered by the MBTA, but not for their purchase, barter, or sale (50 C.F.R. 21.2(a)).[13]

2. Appellees deal in Indian artifacts. Appellees Douglas and Carol Allard, Pierre and Sylvia Bovis, and Robert Ward own stores that sell such artifacts; appellee Eros is an appraiser of them; and appellee Kelley is employed by the Bovises in their store (A. 10-14). Appellees Douglas Allard and Pierre Bovis have previously been convicted for violations of the Eagle Protection Act and the MBTA (A. 11-12). The Allards, the Bovises, and Ward claim that they own artifacts composed in part of the feathers of eagles and various migratory birds "purportedly within the Eagle Protection Act and the Migratory Bird Treaty Act, but which birds were obtained prior to the effective date of Federal protection of such birds pursuant to" those Acts (A. 10, 11-12, 14).[14]

[13] In addition, the Secretary has provided that museums, zoos, and public scientific or educational institutions may purchase and sell migratory birds and their parts among themselves. 50 C.F.R. 21.12. No similar provision is contained in the regulations implementing the Eagle Protection Act, although eagles and their parts forfeited under the Act may be lent to museums, scientific or educational institutions, or zoos (50 C.F.R. 22.13).

[14] Although appellees contend that "[t]he artifacts were created and lawfully owned prior to the effective date of Federal protection" of the birds (Motion to Affirm at 2; cf. *id.* at 9, 13), they do not contend that they owned them before that date. See A. 54.

Specifically, the Allards have identified twelve such artifacts with an alleged total value of $10,300 (A. 55-56); Pierre Bovis has identified 10 such items with an alleged value of $11,950 (A. 58-59);[15] and Ward has identified 10 such items with an alleged value of $21,150 (A. 52-53).[16]

3. Appellees filed this action in the United States District Court for the District of Colorado against the Secretary and certain of his subordinates. They contended that the Eagle Protection Act and the Migratory Bird Treaty Act should not be construed to apply to feathers from birds lawfully killed before the species came under federal protection. They claimed that the Secretary exceeded his authority by applying the Acts to prohibit commercial activity in such preexisting artifacts. If the Secretary's regulations were authorized, then, they contended, the prohibition of commercial activity in previously acquired bird parts constituted a taking of property without due process in violation of the Fifth Amendment (A. 18). The appellees argued that the application of the Acts to pre-existing bird parts had so slight a relation to the protection of current bird

[15] Although he identifies these as his artifacts (A. 58), he also states that "These items were on consignment to me from various private collectors * * *. These have been returned to their owners until the law is amended" (*id.* at 59).

[16] Eros, who alleges in the complaint only that he is an appraiser (A. 13), also identified, in response to interrogatories, 16 artifacts that he owned, with a total alleged value of approximately five thousand dollars (A. 50). Of these, 7 are dated after the MBTA became effective, and contain feathers of unknown type (*ibid.*).

populations as to be arbitrary and capricious. They did not, in terms, claim any taking of property without just compensation.[17]

On cross-motions for summary judgment, the district court ruled for appellees.[18] The court decided no constitutional issue, but expressed "grave doubts whether these two acts would be constitutional if they were construed to apply to pre-act bird products" (J.S. App. 13a). To avoid the supposed constitutional problem, the court interpreted the Acts as "not applicable to preexisting legally-obtained bird parts or products therefrom," and accordingly held the Secretary's regulations invalid insofar as they prohibit commercial activity in such articles (J.S. App. 13a-14a). Although the court assumed that there is no scientific method for accurately detecting the age of feathers, it concluded that "these statutes may be enforced by less drastic regulatory procedures, including affidavits of acquisition, registration by business records or marking, and expert examination" (J.S. App. 5a).

[17] In addition, appellees claimed that the statutes were in excess of Congress' constitutionally delegated powers, and unconstitutionally vague (A. 18-20). The appellees also contended that certain species had been added to the list of those protected under the Migratory Bird Treaty Act pursuant to an improper delegation of authority in the convention between the United States and Mexico. The district court did not reach these issues, and appellees apparently do not intend to press them in this Court. See Motion to Affirm at 3-4.

[18] Because injunction relief was sought, and because the district court took the view that the constitutional arguments were not frivolous, a three-judge court was convened pursuant to 28 U.S.C. (1970 ed.) 2282. Although this statute was repealed in August 1976 (Pub. L. No. 94-381, 90 Stat. 1119), Section 7 (90 Stat. 1120) provides that it does not apply to actions already commenced.

In its judgment, the court declared the Secretary's regulations invalid and unenforceable "as against the Plaintiffs' property rights in feathers and artifacts owned before the effective date of the subject statute" and enjoined the Secretary from interfering with the exercise of those rights "including the rights of sale, barter or exchange" (J.S. App. 16a-17a).

SUMMARY OF ARGUMENT

1. It is impossible to determine the age of feathers with any accuracy, and ancient feathered Indian artifacts are frequently rare and highly prized. Thus, there is a strong incentive to use new feathers to repair or to counterfeit ancient artifacts. The Acts and regulations at issue are designed to protect current bird populations by minimizing this incentive.

Section 1 of the Eagle Protection Act, 16 U.S.C. 668, prohibits the possession, sale, purchase, or transportation of any bald or golden eagles or their parts except as permitted by the Act. Section 1(a) of the Act, 16 U.S.C. 668(a), permits the possession or transportation of such eagles or eagle parts, if the birds were lawfully taken prior to the date they came under the Act's protection. The Act thus plainly forbids the buying or selling of eagle parts, regardless of when the eagles were taken. The Act's structure and legislative history confirm that Congress intended a total ban on commercial transactions in eagle

feathers. This is not an unusual legislative approach. Both Congress and state legislatures have often enacted statutes forbidding the sale of legally taken animals in order to facilitate local game controls and protect local wildlife.

The Migratory Bird Treaty Act also prohibits the possession, sale, purchase, or transportation of any bird or bird part protected by the treaties with Great Britain, Mexico and Japan, except as permitted by regulations issued by the Secretary under the Act. Section 3 of the Act, 16 U.S.C. 703, authorizes the Secretary to determine whether to allow the taking, possession, purchase or sale of protected birds or bird parts. The Secretary's regulation forbidding the buying and selling of the feathers of protected birds, no matter when the birds were killed, is authorized by the Act.

2. The prohibition on the sale of artifacts containing feathers of birds killed before the effective dates of the Acts does not constitute a taking of appellees' property without just compensation in violation of the Fifth Amendment. First, appellees do not contend that they themselves possessed any artifact at the time the statute prohibiting its sale was enacted. Since the only persons whose property was arguably "taken" by the statutes at issue were those who owned the artifacts when they became subject to the prohibtion on their sale, appellees have no standing to claim a denial of just compensation.

In any event, the factors identified in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 123-128 (1978), indicate that these statutes involve the adjustments of economic benefits and burdens for the common good, rather than a taking of property for governmental purposes that requires just compensation. Finally, if such compensation is constitutionally necessary, appellees' remedy is a suit for payment in the Court of Claims under the Tucker Act, 28 U.S.C. 1491, rather than a declaration that the Eagle Protection Act and the MBTA are unconstitutional.

ARGUMENT

I. The Eagle Protection Act Requires, And The Migratory Bird Treaty Act Permits, The Secretary to Ban Commercial Transactions Involving Feathers Taken From Birds Killed Before The Species Came Under Federal Protection.

The record establishes two facts that bear importantly on the interpretation of the statutes at issue here: First, feathered Indian artifacts predating the enactment of the statutes may be highly valued items (A. 50-56), so that if there is a commercial market for them, there is inevitably a strong incentive to attempt to pass recent copies off as originals, or to replace feathers in existing artifacts. Second, there is no effective way, from observation or scientific tests, to determine the age of bird feathers; and it is therefore impossible to know whether any particular feathers antedate the enactment of the relevant statute (A. 44-46, 48-49).[19] This combination of

[19] In contrast, the provision in the Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3760-3761,

incentive and opportunity poses a real threat to the living bird population, the only source of the necessary feathers, and thus requires stringent measures. It also justifies the conclusion of Congress and the Secretary that the alternative protective measures suggested by the district court (J.S. App. 5a) are inadequate.[20]

A. *The Eagle Protection Act*

1. The language of the Eagle Protection Act is clear: "Whoever * * * shall * * * take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import * * * any bald eagle * * * or any golden eagle, alive or dead, or any part, nest or egg thereof * * * shall be fined * * * or imprisoned * * *: *Provided* * * * that nothing herein shall be construed to prohibit possession or transportation of

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permitting the importation of goods made before 1830 from the parts of endangered or threatened species, was based on advice from the Customs Service that experts can readily distinguish articles made before that date from those made thereafter. H.R. Conf. Rep. No. 95-1804, 95th Cong., 2d Sess. 24 (1978).

[20] In addition to the obviously difficult enforcement and administrative problems inherent in the registration or affidavit methods of control suggested by the district court, the current bird populations would be deprived of all protections while these systems were being established. Even a relatively short de facto "open season" on such birds as bald eagles could seriously affect the survival of the species in this country (see *supra*, page 3). In any event, the need for, and adequacy of, specific protective measures is a question for the legislature or the Secretary under a statutory delegation of authority, not the courts. See *New York ex rel. Silz* v. *Hesterberg*, 211 U.S. 31, 39-40 (1908); cf. *Califano* v. *Aznavorian*, No. 77-991 (Dec. 11, 1978) slip op. 8-9, *TVA* v. *Hill*, 437 U.S. 153, 194 (1978).

any bald eagle * * * or any part * * * thereof lawfully taken prior to June 8, 1940, and that nothing herein shall be construed to prohibit possession or transportation of any golden eagle * * * or any part * * * thereof, lawfully taken prior to [October 24, 1962]." Neither appellees nor the court below have suggested any basis for reading the narrow proviso, expressly exempting only the *possession* and *transportation* of eagles and eagle parts taken before they were safeguarded by the Act, as creating an implied exemption from the broad ban, announced in the same sentence, on any commerce in bald or golden eagles or their parts. Indeed, the text leaves little doubt that Congress focused on the precise problem of property interests in existence at the time of enactment, carefully weighed those interests against the need to protect the eagle from extinction, and struck the balance by condoning continued ownership and gratuitous transfers but outlawing commercial transactions for the future.

The Eagle Protection Act as a whole confirms the conclusion that Congress intended to prohibit *all* commerce in eagles and their parts, whenever taken. The statute enacts a comprehensive ban on all dealings in eagles, coupled with the grant of authority to the Secretary to make narrow exceptions under specifically identified circumstances.[21] Thus, although the

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[21] For example, the Secretary "may permit the taking, possession and transportation of golden eagles for the purposes of falconry, except that only golden eagles which would be taken because of depredations on livestock or wildlife may be taken for purposes of falconry." 16 U.S.C. 668a.

Secretary may authorize the "taking, possession and transportation" of specimens for public museums, scientific societies and zoos, or for Indian religious purposes, or to protect wildlife or livestock (16 U.S.C. 668a), the Act nowhere empowers the Secretary to make any exception to the flat ban on the sale, purchase or barter of any eagle part.[22]

The legislative history also suggests that Congress was deeply concerned about the precarious situation of the eagle, and intended to provide maximum deterrence to the killing of eagles. There is no hint of an unexpressed intent to permit the continuation of even a limited market for eagle feathers. The Act was revised in 1972 to provide for increased penalties and to require a less specific criminal intent, in response to a report that commercially motivated airborne hunting parties the previous winter had killed "nearly 500 rare bald and golden eagles." H.R.

[22] The Secretary's regulations implementing the Eagle Protection Act have consistently reflected the Act's total ban on all sales of eagle feathers (see note 7, *supra*). This uniform interpretation of the agency charged with the administration of the Act is entitled to great weight. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974). The court below was in error when it implied that the regulatory prohibition was first promulgated in 1974 (J.S. App. 3a-4a). The current prohibitory language of 50 C.F.R. 22.2 first appeared in the regulations when they were revised in 1963 to reflect the extension of the Act to golden eagles (50 C.F.R. 11.8(b), 28 Fed. Reg. 975-976 (1963)). Nothing in either the statement of considerations for the revised regulations or the notice of proposed rulemaking on which they were based (27 Fed. Reg. 12138 (1962)) suggested that the rephrasing of the prohibition involved any change in preexisting regulatory policy.

Rep. No. 92-817, 92d Cong., 2d Sess. 4-5 (1972). At that time, Congress reviewed the implementation and enforcement of the Act (see *id.* at 6-7) and must have been aware of the Secretary's regulations explicitly providing that eagle parts lawfully acquired before 1940 or 1962 may be possessed and transported "but may not be * * * purchased, sold, traded, bartered, or offered for purchase, sale, trade or barter" (50 C.F.R. 11.8(b) (1963)). Yet, far from expressing any disagreement with this interpretation of the statute, Congress strengthened the Act to facilitate the prosecution of alleged violators —the precise function served by the regulatory provision. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974).[23]

[23] Congress has recently provided that "it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to * * * exercise the traditional religions of the American Indian * * * including * * * use and possession of sacred objects." American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469. In explaining the purpose of this provision, the Senate Report notes: "prohibiting the possession and exchange by Indians of feathers in one's family for generations, or the use of feathers acquired legally does not help preserve endangered species. It does prevent the exercise of American Indian religions." S.Rep. No. 95-709, 95th Cong., 2d Sess. 3 (1978).

The Eagle Protection Act expressly permits the possession of parts of eagles lawfully taken before 1940, and permits eagles to be taken for Indian religious purposes under permits from the Secretary (16 U.S.C. 688(a), 668a). That Act is accordingly entirely consistent with the newly enunciated federal policy. That policy does not contemplate any commerce in feathers. Appellees have not suggested any religious motivation for their sale of feathers.

In sum, the language, structure and history of the Eagle Protection Act, like that of the Endangered Species Act considered in *TVA* v. *Hill*, 437 U.S. 153, 174 (1978), "indicates beyond doubt that Congress intended [the protected] species to be afforded the highest of priorities." Here, as there,

> While there is no discussion in the legislative history of precisely this problem, the totality of congressional action makes it abundantly clear that the [Secretary's regulation] is wholly in accord with both the words of the statute and the intent of Congress. The plain intent of Congress in enacting the statute was to halt and reverse the trend toward species extinction, whatever the cost. (437 U.S. at 184).

The result should be no different here, where the species involved is the eagle, our national symbol, rather than the snail darter, "hardly an extraordinary" species (*id.* at 197, n. 3, Powell, J., dissenting), and the interests on the other side, although not insignificant, do not approach the millions of dollars of unrecoverable costs and the economic improvement of a substantial area of the country at stake in the Tellico Dam Project (*id.* at 157-158).

2. Our reading of the Eagle Protection Act creates no jarring precedent. The Congressional decision to protect the present eagle population by removing commercial incentives for killing them is consistent with well-tested legislative approaches to the protection of wildlife.

Many state statutes protect local wildlife from illegal hunting by banning the possession or sale of

similar wildlife legally taken outside the state.[24] Thus, in *New York ex rel. Silz* v. *Hesterberg*, 211 U.S. 31, 38 (1908), this Court upheld a New York statute which made illegal the possession of certain game birds during the closed season, even though the specimens in question were legally taken in Europe and did not even resemble the domestic variety. Similarly, in *Bayside Fish Co.* v. *Gentry*, 297 U.S. 422 (1936), this Court upheld the regulation by state law of the processing of sardines taken on the high seas and intended only for interstate and foreign consumption. State regulation was deemed appropriate because the state act "operate[d] as a shield against the covert depletion of the local supply, and thus tend[ed] to effectuate the policy of the law by rendering evasion of it less easy." 297 U.S. at 426.[25]

So, also, the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*) has been interpreted as banning commerce in specimens of protected species, regardless of when or where the specimens were taken or the legality of that taking. *United States* v. *Kepler*,

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[24] Congress has expressly permitted each state to treat all game, birds, and fish possessed within the state as if they were taken within that state. 16 U.S.C. 667e; 16 U.S.C. 852b.

[25] Similar provisions have regularly been upheld in state courts. *State* v. *Shattuck*, 96 Minn. 45, 104 N.W. 719 (Sup. Ct. 1905); *Commonwealth* v. *Savage*, 155 Mass. 278, 29 N.E. 468 (Sup. Jud. Ct. 1892); *People* v. *Dornbos*, 127 Mich. 136, 86 N.W. 529 (Sup. Ct. Mich., 1901); *Javins* v. *United States*, 11 App. D.C. 345 (1897); *Maritime Packers* v. *Carpenter*, 99 N.H. 73, 105 A. 2d 38 (Sup. Ct. 1954); *Salasnek Fisheries, Inc.* v. *Cashner*, 9 Ohio App. 2d 233, 224 N.E. 2d 162 (Ct. App. 1967).

531 F. 2d 796 (6th Cir. 1976); *Delbay Pharmaceuticals Inc.* v. *Department of Commerce*, 409 F. Supp. 637 (D. D.C. 1976).[26] The Eagle Protection Act, having the same purpose to protect animals from extinction, may be supposed to intend the same absolute prohibition on commercial transactions.

B. *The Migratory Bird Treaty Act*

The Migratory Bird Treaty Act is strikingly similar to the Eagle Protection Act. Both are designed to protect the species of birds they safeguard from extinction (compare 54 Stat. 250 and 76 Stat. 1246 (Eagle Protection Act) with H.R. Rep. No. 243, 65th Cong., 2d Sess. (1918) and H.R. Rep. No. 93-936, 93d Cong., 2d Sess. (1974) (Migratory Bird Treaty Act).[27] Both broadly prohibit the taking, killing, possession, sale, purchase or barter of birds or bird parts except as allowed by permits that the Secretary is authorized to issue (compare 16 U.S.C. 668a (Eagle Protection Act) with 16 U.S.C. 703 (MBTA)). In addition, both define the birds to which they apply by reference to the species involved, thus in terms covering all birds within the species, not just the current populations of those birds.[28] The only relevant difference is that the MBTA does not so narrowly define the Secretary's discretion to issue permits as does the Eagle Protection Act. But his authority to ban all commercial transactions is not left in doubt.

Instead of specifying the precise circumstances in which permits may issue, in the MBTA "the Secretary is authorized and directed * * * to determine when, and to what extent, if at all, and by what

[26] In 1976, Congress amended the Endangered Species Act of 1973 to permit a limited exception for the sperm whale product involved in *Delbay Pharmaceuticals*. Endangered Species Act Amendments of 1976, Pub. L. No. 94-359, 90 Stat. 911. The narrow exception enacted confirms the accuracy of the *Delbay* court's reading of the general statutory provisions. The 1976 amendment required an application to the Secretary within one year of its passage, and any permit issued under the exception would have a life no longer than 3 years. 16 U.S.C. 1539(f)(3)(A); 16 U.S.C. 1539(f)(4)(C). The amendment also expressly did not excuse violations committed prior to the date of the amendment. 16 U.S.C. 1539(f)(7). See also 122 Cong. Rec. 3258 (1976) (Rep. Sullivan); 122 Cong. Rec. 3259 (1970) (Rep. Leggett).

[27] The district court was accordingly incorrect in distinguishing the basis for the enactment of the Endangered Species Act as "Congress' reaction to the practical circumstances presented by endangered and threatened species" (J.S. App. 9a). That same concern motivated the MBTA and the Eagle Protection Act and they should also be read consistently with their purpose—to provide effective protection to the species they cover.

[28] The MBTA defines the birds to which it applies as "any migratory bird * * * included in the terms of the Convention between the United States and Great Britain * * *, the United States and the United Mexican States * * *, and the United States and the Government of Japan." The conventions describe the birds within the treaty by reference to their species. See Article II, Convention between the United States and Great Britain, August 16, 1916, 39 Stat. 1702; Article IV, Convention Between the United States of America and the United Mexican States, February 7, 1936, 50 Stat. 1313; Article II, Convention Between the United States and Japan, March 4, 1972, 25 U.S.T. 3329. Article I, Convention between the United States and the United States and the Union of the Soviet Socialist Republic, November 19, 1976, 7 Envir. L. Rep. 40318.

means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export" of any bird or bird parts subject to the Act (16 U.S.C. 704). This greater discretion apparently reflects the more varied circumstances of the several bird populations covered by the Act, not all of which require the stringent protections Congress has provided for eagles. Congress has accordingly left judgments about the particular degree of protection appropriate for specific species to the Secretary.[29] That the MBTA does not itself prohibit the sale or purchase of parts of birds taken before the effective date of the Act implies no general exemption.[30] It simply means that the Secretary may permit such transactions if he concludes that they are consistent with the relevant treaties and the degree of protection appropriate for the present population of the species involved. The Secretary's regulations (50 C.F.R. 21.2, 21.12) reflect his conclusion that adequate protection of current migratory bird populations requires a ban on commercial transactions involving bird parts lawfully acquired before the effective date of federal protection, except between

[29] The Secretary has provided separately for certain species of depredating birds; 50 C.F.R. 21.41 to 21.45.

[30] When Congress intended an exception to the Act's applicability to all birds of the covered species, it made that exception explicit: the Act does not apply to the breeding of migratory game birds on farms, or to the sale of birds so bred under proper regulation to increase the food supply (16 U.S.C. 711).

public museums and other scientific and educational institutions.

Nothing in the MBTA, nor in the treaties it implements, suggests that this regulation exceeds the Secretary's authority—*i.e.*, that the Secretary may not protect the current populations of the species involved by eliminating the commercial incentive for killing them. Neither the Act nor the Treaties are limited to illegally taken birds.[31] Instead, they apply to all birds of the defined species (see note 28, *supra*). Moreover, the treaties recognize the need to impose special limitations on commercial uses of the protected birds and their products.[32] In substantially

[31] Appellees find such a limitation in the language of the Japanese Treaty. That treaty first defines migratory birds by reference to the characteristics of the species covered (Article II). It then prohibits the taking of migratory birds or their eggs, and "[a]ny sale, purchase or exchange of these birds or their eggs, taken illegally, alive or dead, and any sale, purchase or exchange of the products thereof or their parts" (Article III). But both "taken illegally" and "alive or dead" apparently modify "these birds [*i.e.*, birds of the defined species] or their eggs" and not "the products thereof [*i.e.*, of birds of the defined species] or their parts." In any event, a single ambiguous phrase in the treaty scarcely outweighs the clear intent expressed elsewhere in the treaty that the contracting parties will take whatever measures they find appropriate for the protection of the identified species (see, e.g., Articles IV, VII). The language of the Department of the Interior's comments and the Senate Report on the 1974 amendments to the MBTA, on which appellees also rely (Motion to Affirm at 11-12) simply track the ambiguous language of the Japanese treaty in describing its effect.

[32] For example, the Treaty with Great Britain contains exemptions permitting Eskimos and Indians to take certain birds for food or clothing on condition that no birds or parts

increasing the Act's penalties for commercial violations, 16 U.S.C. 707(b)-(c), Congress recognized that the survival of migratory birds is more seriously threatened by commercial than by non-commercial incentives for taking them. S. Rep. No. 1779, 86th Cong., 2d Sess. 1-2 (1960). Finally, at the time the Migratory Bird Treaty Act was passed, laws prohibiting sales of birds and game for the protection of living animals were common, including laws that made illegal commercial transactions in legally taken animals. See cases cited, *supra*, at pages 18-20. When Congress undertook to provide the Secretary with effective authority to protect migratory birds, it surely intended that he should possess such familiar tools.[33]

The court below nevertheless relied on three early district court cases refusing to apply the MBTA to birds or parts of birds taken before the Act was passed,[34] and concluded that Congress was aware of those cases when it amended the Act and either agreed with them or concluded that "a retrospective application" of the statutes would be unconstitutional

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so taken are sold or offered for sale (Article II, paras. 1, 3, 39 Stat. 1703). Cf. S. Rep. No. 95-1175, 95th Cong., 2d Sess. 6 (1978).

[33] When Congress intends that acts protecting wildlife not apply to animals or parts of animals legally taken before they came under federal protection, it has made the exemption explicit. See *supra*, notes 19 and 26; 16 U.S.C. 1732(e).

[34] *United States* v. *Fuld Store Co.*, 262 F. 836 (D. Mont. 1920); *In re Informations Under Migratory Bird Treaty Act*, 281 F. 546 (D. Mont. 1922); *United States* v. *Marks*, 4 F. 2d 420 (S.D. Tex. 1925).

(J.S. App. 13a).[35] While we doubt that these cases were correctly decided in the 1920's,[36] they are in any event of little significance today in the light of more modern recognition of the extent to which the federal government may validly regulate commerce in wild animals. *Hughes* v. *Oklahoma*, No. 77-1439

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[35] It is clear that the prohibition on current sales or exchanges of feathers involves no retroactive application of the Act. Sales occurring after the statute was enacted are prohibited, but pre-Act takings are not punished. See *Delbay Pharmaceuticals, Inc.* v. *Dep't of Commerce*, 409 F. Supp. 637, 642 (D. D.C. 1976).

[36] *Fuld* involved a criminal charge of possession and offer for sale of articles made from legally taken heron feathers. The court dismissed the information, taking the view that the owners of the articles would be deprived of property without just compensation if the Act applied and that forbidding mere possession might be unconstitutional as an ex post facto law. The Fifth Amendment argument has no merit today (see pages 30-34, *infra*), and the ex post facto argument could apply only where possession was made illegal, which is not the case here. *In re Informations* indicated that the Migratory Bird Treaty Act (a law the court found "more honored in the breach than in the observance," 281 F. at 549), and its regulations were not clear enough to forbid the sale of a legally taken, pre-protection stuffed and mounted duck. In our view, the Act itself is sufficiently clear, and the regulations in the present case remove any possible doubt. The rationale of *Marks* is not clear. The case appears to hold that Congress lacks the power to make illegal the sale of legally taken birds because it lacks a "general police power" over migratory birds, an incorrect proposition that is not pressed in the present case. The pleading requirement imposed by these cases—that the government in a criminal prosecution under the Act must allege that the birds were taken subsequent to passage of the Act—is rejected in *United States* v. *Hamel*, 534 F. 2d 1354 (9th Cir. 1976); *United States* v. *Blanket*, 391 F. Supp. 15, 19 n. 1 (W.D. Okla. 1975).

~~parts" (Article III). But both "taken illegally"~~ and "alive

(Apr. 24, 1979), slip op. 3-13.[37] In amending the MBTA in 1974, it is hardly probable that Congress adopted the restrictive interpretation given the Act in three district court cases in the 1920's. It is far more likely to have been familiar with, and relied on, the interpretation of the Act incorporated in the regulations of the agency responsible for its implementation,[38] and the scope of comparable statutes relating to the protection of wildlife.[39]

All that remains is a suggestion that the Secretary has abused his discretion in concluding that a ban on commercial transactions involving the parts of any protected bird, whenever taken, is an appropriate method of protecting current populations of migratory birds. But since that precise method of protection is incorporated into the Eagle Protection Act, it scarcely can be argued that Congress rejected it as a possible method of protection for migratory birds. To the extent that the objection is to the need for that protection with respect to any specific species of cov-

[37] More consistent with current law is *United States* v. *Richards*, 583 F.2d 491 (10th Cir. 1978), rejecting these early cases and upholding the application of regulations under the Migratory Bird Treaty Act to prohibit the sale of birds raised in captivity, without a showing that the birds were acquired after they became subject to federal protection. See also *Delbay Pharmaceuticals* v. *Department of Commerce*, *supra*; *United States* v. *Species of Wildlife*, 404 F. Supp. 1298 (E.D. N.Y. 1975); *United States* v. *Kepler*, 531 F.2d 796 (6th Cir. 1976); and see the discussion in part II, *infra*.

[38] See *supra*, page 22.

The relevant regulatory provisions have remained virtually unchanged since 1960 (25 Fed. Reg. 8399 (1960)).

[39] See *supra*, page 19.

ered bird (see, *e.g.*, J.S. App. 9a), that is a matter for the Secretary, not the courts, which "have no expert knowledge on the subject of endangered species," *TVA* v. *Hill*, *supra*, 437 U.S. at 194.[40]

II. The Eagle Protection Act And The Migratory Bird Treaty Act May Constitutionally Be Applied To Prohibit Commercial Transactions In The Feathers Of Birds Lawfully Killed Before Their Species Came Under Federal Protection

The district court concluded that the Eagle Protection Act and the MBTA are inapplicable to pre-existing artifacts in part because of "grave doubts whether these two acts would be constitutional if they were construed to apply to pre-act bird parts" (J.S. App. 13a). The suggestion is that the effect of the statutes, as implemented by the Department of the Interior, is to take private property without just compensation, in violation of the Fifth Amendment (Motion to Affirm at 3).[41] We turn to that question.

[40] The district court's conclusion that the "statutes may be enforced by less drastic regulatory procedures" J.S. App. 5a, similarly trenches on matters reserved to the Secretary's discretion. See page 14, *supra*, note 20.

[41] In their complaint appellees contended that the statutes and the Secretary's regulations constitute "a deprivation of propery without due process of law, in violation of the Fifth Amendment" (A. 18). That contention has apparently now been rephrased as a claim that the statutes as applied in the regulations constitute a taking of property without just compensation (see Motion to Affirm at 3). There is, in any event, no colorable due process claim here, since application of the statutes to parts of birds taken before the species came under federal protection clearly is rationally related to the protection of current bird populations. See *supra*, pages 13-14; *Delbay*

A. *Appellees' Standing To Present The Constitutional Challenge*

There is, at the outset, a serious question whether the appellees are in a position to assert that, as applied to *them*, the two Acts accomplish a taking of lawfully obtained property. The fact is that none of the appellees has alleged that he acquired any property interest in the protected bird feathers before commercial transactions were banned.

The complaint filed in the district court alleged only that appellees own or do business in artifacts containing feathers taken from protected birds, "which birds were obtained prior to the effective date of Federal protection of such birds" (A. 10-15). But the complaint avoids alleging that any of the appellees himself acquired any artifacts prior to the effective dates of federal protection.[42] That this omis-

Pharmaceuticals, Inc. v. *Department of Commerce, supra,* 409 F. Supp. at 644 (refusing to convene a three-judge court to consider the same due process claim under a similar statute). The protection of such populations is a legitimate federal interest. *Missouri* v. *Holland,* 252 U.S. 416 (1920).

Neither is there any merit to the suggestion of the court below, citing *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960), that the statutes and regulations could not pass constitutional muster unless they were the least restrictive measures possible (J.S. App. 12a). *Shelton* involved a statute directly touching an individual's First Amendment right of association, rather than legislation affecting property interests in order to accomplish a legitimate congressional purpose. See *Mourning* v. *Family Publications Service, Inc.,* 411 U.S. 356, 377 (1973); *Weinberger* v. *Salfi,* 422 U.S. 749, 768-774); *New York ex rel. Silz* v. *Hesterberg, supra.*

[42] Indeed, Appellee Kelley alleged only that he is an employee of Appellees Pierre and Sylvia Bovis, and that the

sion is intentional is indicated by the Motion to Affirm at 2, which, despite our flagging the defect in the Jurisdictional Statement (at 18-19), continues to allege impersonally that "the artifacts were created and lawfully owned prior to the effective date of Federal protection of birds within the Acts" (cf. Motion to Affirm at 8, 13). The inference is plain that appellees cannot say they themselves obtained the artifacts before the prohibition became effective.

This is not surprising. Except with respect to birds first protected in 1972 and 1974, it is most unlikely that appellees have held for sale artifacts containing feathers covered by either federal statute since the effective date of those Acts. We need only remember that the MBTA was enacted in 1918 and amended in 1937 to embrace additional species of migratory birds, and that eagles have been protected by the Eagle Protection Act since 1940 for bald

statutes as interpreted restrict his ability to engage in his chosen employment (A. 13-14). Appellee Eros alleged only a similar restriction on his ability to practice his occupation as an appraiser of Indian artifacts (A. 13), although he did assert ownership of several artifacts, some of which contain feathers from birds taken before they were federally protected (A. 50; see also note 16, *supra*). Even if the Fifth Amendment prohibition on the "taking of property for public use, without just compensation" applies to restrictions on occupations of this nature, any 'taking' involved is, as to these appellees, de minimis. For example, Kelley cannot participate in the sale of the 10 items identified by Bovis (A. 58-59). Both he and Eros can, however, continue to deal in other Indian artifacts, including pottery, bead work, silver, basketry and clothing, none of which typically include the feathers of protected birds.

eagles and 1963 for golden eagles. See *United States* v. *Allard*, 397 F. Supp. 429 (D. Mont. 1975).

Yet, of course, the only persons who properly can complain that their property was "taken" by the enactment of the statutes in suit are those who were, *at the time*, the owners of the affected artifacts. See *United States* v. *Allard*, 397 F. Supp. 429 (D. Mont. 1975). The value of any artifacts purchased by appellees *after* the effective date of the Act had already been diminished by the applicability of the Act. The price appellees paid presumably reflected that fact, and appellees now seek a windfall in the restoration of value to items they purchased when it was illegal to do so.[43] At all events, appellees are not in a position to contend that the Acts constituted a taking of their property.[44]

B. *The Merits of the Constitutional Claim*

Appellees would fare no better if we assume they have standing to raise the issue of whether the Acts constituted a taking of their property without just compensation. The claim is effectively foreclosed by *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 123-128 (1978).

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[43] If they paid more, appellees should not be heard to complain that they have suffered a loss as a result of a purchase forbidden by law. They must assume the risk if they gambled that the Secretary's regulations would be held unauthorized or the statutes declared unconstitutional and the result is otherwise.

[44] Appellees can have no constitutionally recognized property interest in artifacts they hope to purchase or simply hold on consignment (A. 59) Cf. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972).

For the reasons noted above, it is far from clear that the Acts have had any significant adverse economic impact on appellees, or have interfered at all with their "distinct investment-backed expectations" (438 U.S. at 124; *Goldblatt* v. *Hempstead*, 369 U.S. 590, 594 (1962)).[45] Moreover, since appellees' possession of the articles is undisturbed, there is no "physical invasion by the government" (*Penn Central Transportation Co.* v. *New York City*, *supra*, 438 U.S. at 124).[46] In sum, these Acts present yet another example of the appropriate adjustment of economic benefits and burdens to promote the common good. As this Court noted in *Penn Central*, *supra*, 438 U.S. at 124-125:

> "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values. Exercises of the taxing power are one obvious example. A second are the decisions in which this Court has dismissed "taking" challenges on

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[45] The fact that they now possess many rare feathered artifacts does not indicate that they acquired them before the Acts applied to them at prices reflecting their pre-Act value. And since the Acts permit the possession or exhibition of the artifacts, they do not interfere with any legitimate expectations concerning articles acquired for personal enjoyment or exhibition.

[46] Nor is there any "acquisition[] (by the government) of resources to permit or facilitate uniquely public functions" (*Penn Central*, *supra*, 438 U.S. at 128.)

the ground that, while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute "property" for Fifth Amendment purposes.

More importantly for the present case, in instances in which a state tribunal reasonably concluded that "the health, safety, morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests. Zoning laws are, of course, the classic example, which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property.

Zoning laws generally do not affect existing uses of real property, but "taking" challenges have also been held to be without merit in a wide variety of situations when the challenged governmental actions prohibited a beneficial use to which individual parcels have previously been devoted and thus caused substantial individualized harm. [Citations omitted.]

Appellees agree that *Penn Central* and the cases cited therein demonstrate that "the most valuable use of property can be prohibited without compensation;" but they insist that "some valuable uses must be permitted to remain" (Motion to Affirm at 15). The challenged Acts and regulations are unconstitutional, it is argued, because they "prohibit all valuable uses of whatever nature for the property of the Appellees" (*ibid.*). But we cannot accept that prohibiting the sale of appellees' feathered Indian artifacts makes them "wholly useless" (*ibid.*). They are still objects of rarity and interest that can be possessed for personal enjoyment or displayed for profit. This Court concluded in *Jacob Ruppert* v. *Caffey*, 251 U.S. 264, 301-303 (1920) that there was no unconstitutional taking of a brewery's stock of beer when Congress prohibited beer sales. Surely appellees' feathers retain at least as much value as the post-prohibition beer. See also *Mugler* v. *Kansas*, 123 U.S. 623 (1887); *Murphy* v. *California*, 225 U.S. 623 (1912); *Everard's Breweries* v. *Day*, 265 U.S. 545 (1924).

Finally, even if there is a taking, nothing in either of these Acts prevents an action in the Court of Claims under the Tucker Act, 28 U.S.C. 1491, for the payment of just compensation.[47] That remedy would be available to anyone who could show an actual taking. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126-127 (1974).[48] It follows that these Acts do not take private property without just com-

[47] The Eagle Protection Act does prevent such an action in one narrow circumstance—when a federal grazing lease is cancelled because of a violation of the Act or regulations issued thereunder (16 U.S.C. 668(c)). Congress has thus specifically defined the single situation in which it does not intend that federal compensation be available.

[48] Appellees suggest (Motion to Affirm at 16) that they are entitled to fair compensation for their artifacts. However, their complaint sought only declaratory and injunctive relief (A. 9, 26-28). And, at all events, since they alleged losses exceeding $10,000 (A. 9, 10-14), the district court lacks jurisdiction to entertain appellees' Tucker Act claim. 28 U.S.C. 1346(a)(2).

pensation in violation of the Fifth Amendment. *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 94 n. 39 (1978); *Delbay Pharmaceuticals, Inc.* v. *Dep't of Commerce*, *supra*, 409 F. Supp. at 645, n. 3.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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In the
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-740

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET. AL., APPELLANTS
V.
L. DOUGLAS ALLARD, ET. AL.

BRIEF FOR APPELLEES

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L. DOUGLAS ALLARD, ET AL.

BRIEF FOR THE APPELLEES

QUESTIONS PRESENTED

1. Do the Eagle Protection Act and the Migratory Bird Treaty Act prohibit all sales of feathered American Indian Artifacts which predate the effective date of the statutes?
2. Can the Appellants constitutionally prohibit all sales of feathered Indian artifacts which were created prior to the protection of various birds afforded by the Eagle Protection Act and Migratory Bird Treaty Act?

STATEMENT

This action concerns American Indian artifacts comprised in part of feathers of various birds now within the protection of the Eagle Protection Act and the Migratory Bird Treaty Act. Each artifact was crafted and constituted private property prior to the effective date of any applicable legislation.[1] The oldest item, a Plateau war bonnet, owned by Appellee Ward, was created more than 175 years ago.[2]

Appellees do not claim any interest in items made from illegally-killed wildlife, nor do they claim any particular rights to use wildlife subject to existing regulation.[3] Appellees accept that protection of existing wildlife is a legitimate governmental purpose and state their support for such a goal.

Appellees do claim fundamental property rights in Indian artifacts which predate the protective legislation.

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[1] This action was determined by the District Court on cross motions for summary judgment. Prior to the Appellants' Motion for Summary Judgment, the Appellees had produced and described each artifact pursuant to the Defendants' First Set of Interrogatories to Plaintiffs, and Defendants' Motion for Production. Appellants did not challenge the genuineness, nor the age stated for any artifact and such statements, for the purposes of this action, must be accepted as fact. A description of each artifact and the age of each artifact is set forth in Appendix, pages 50-60.

[2] Item No. 4, answer of interrogatory by Robert G. Ward, Appendix, page 52.

[3] In this regard, the claims of the Appellants are to be distinguished from those which were presented by various manufacturers desiring the right to continue to use skins from existing wildlife for commercial purposes, in *A. E. Nettleton, et al. v. Diamond,* 27 NY2d 182, 315 NY Supp2d 625, 264, NE2d 118, 44 ALR3d 993; appeal dismissed, 401 U.S. 969, 91 S Ct 1201, 28 L Ed2d 319. In this action, Appellees do not claim any right to the continued taking of wildlife for the production of commercial materials.

Appellants purport to prohibit, absolutely, Appellees' rights to dispose of their property by any sale or exchange, notwithstanding that the items are of substantial value and admittedly predate the statutes enforced by the Appellants.

The artifacts which the Appellants would ban from commerce are not only harmless in themselves,[4] but have been declared by Congress to be worthy of legislative protection.[5]

A Convention between the United States and Great Britain (39 Stat. 1702), concluded in 1918, established the pertinent regulatory framework. The enactment of the Migratory Bird Treaty Act (16 USC § 703 *et seq*) on July 3, 1918, implemented this convention.

Other Conventions, with Mexico in 1936,[6] (supplemented in 1972[7]), Japan in 1974,[8] and the Soviet Union in 1978,[9] added additional birds to the provisions of the Migratory Bird Act.

While the Migratory Bird Act dates from 1918, it should be noted that the type of birds whose feathers had been predominantly used to create the Appellees' artifacts

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[4] See: *United States v. Fuld Store Co.,* 262 F 836 (D Montana 1920) at page 837: "In harmless, useful, and valuable property there is a vested right of possession, use, enjoyment and sale—a liberty of action, of which owners cannot be arbitrarily deprived without compensation."

[5] See 16 USC §470; §470 a.(b)(3); also see pending legislation for the protection of antiquities, being HR 1825 and SB 490.

[6] 50 Stat. 1313.

[7] Letter of March 10, 1972, of U. S. Ambassador to Mexico, 23 U.S.T. 260 T.A.I.S. #73-02.

[8] 25 U.S.T. 3329.

[9] November 19, 1976, 7 Environmental Law Reports 40318.

were not included in the Migratory Bird Conventions until 1972.[10]

In 1974, an amendment was added to the Migratory Bird Act (P.L. 93-300, §1, 88 Stat. 190) in which, for the first time, the Act referred to ". . . any product, whether or not manufactured, which consists, or is composed in whole or in part, of any such bird [those within the Convention] . . ."

Following the 1972 supplement and the 1974 Amendment, the Appellants, through the Bureau of Sports Fisheries & Wildlife, notified Indian Arts and Crafts dealers, by certified letters, of their apparent intent to apply the Migratory Bird Act and the Eagle Protection Act to all items regardless of age.[11] Enforcement, according to this interpretation of the Acts, was initiated. Appellees Allard and Bovis were criminally prosecuted for the sale of pre-existing artifacts to undercover agents.

Faced with the likely prospect of continued enforcement against sales of artifacts created prior to the Act and without Executive recognition of any exemption, the Appellees filed this action on September 19, 1975, pursuant to the Declaratory Judgment Act (28 USC §2201), seeking declaratory and injunctive relief (28 USC §2282). Jurisdiction was premised upon 28 USC §§ 1331 and 1337.

On cross Motions for Summary Judgment, the District Court determined that the prohibitions in the Eagle

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[10]The feathered artifacts, as described by the Appellees, Appendix, pages 50-60, predominately include feathers from eagles, hawks, and owls. These types of birds were added to the Migratory Bird Treaty Act by the exchange of letters between the Ambassadors of the United States and Mexico, supra, footnote 7.

[11]See Exhibit C, letter from the Department of the Interior to Appellee Ward, Appendix, pages 30-34.

Protection Act and the Migratory Bird Treaty Act were not applicable to pre-existing, legally obtained, feathered Indian artifacts; the interpretive regulations were therefore unauthorized extension of the Acts and violated Appellees' property rights afforded by the Fifth Amendment. The Court suggested a reasonable regulatory procedure[12] as an acceptable balance between the public purpose and the property rights of the Appellees. The District Court weighed each legal and factual issue germane to the difficult determination of when "justice and fairness" dictate that the burdens imposed on the few are so disproportionate as to invalidate the regulatory scheme. The Court considered, as it must, the unique circumstances presented in this case. The Appellants, the Court concluded, sought to place a disproportionate and therefore impermissible burden on the Appellees.

SUMMARY OF ARGUMENT

The Eagle Protection Act, 16 USC §668, and the Migratory Bird Treaty Act, 16 USC §703 do not apply to lawfully acquired feathered Indian artifacts which were created and privately owned prior to the effective date of the protective legislation.

Six Federal Courts, prior to the decision of the three-judge District Court in this case, have considered the application of the Migratory Bird Act to pre-existing property. Each Court has determined that the Act does not

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[12]District Court Opinion, Jurisdictional Statement, Appendix A, page 12a. The regulation procedure provided by the Marine Mammal Protection Act, 16 USC §1361; and the regulations implementing this Act, being 50 C.F.R. §18.14, was noted as an "obvious possibility."

prohibit sales of property which existed prior to the Act. No Court in over fifty years of consideration has upheld the position of the Appellants.

Neither Act specifically includes pre-existing property and the legislative intent of each Act is obviously to protect living birds. This intent cannot be furthered by an interpretation of the Acts which continue to permit possession and "gratuitious" transfers of the feathered portions of any artifact, yet stating that "commercial" sales of feathered artifacts are unlawful.

Since all value of the pre-existing artifacts is destroyed by the ban of all "commercial" sales of such items, there is not only a grave doubt as to the constitutionality; but an unauthorized and unlawful taking of the property of the Appellees without compensation and without remedy in a suit under the Tucker Act, 28 USC §1491.

Using the tests enumerated by this Court in *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978), the constitutional invalidity of the Appellants' application of the Acts to prohibit all commercial sales of pre-existing feathered artifacts is shown:

1. All value of the Appellees' property is destroyed, and such destruction of value is not merely a consequence of regulation, but is the purpose of the Appellants.

2. While the protection of existing wildlife is a legitimate goal, the health and safety of the citizens is not imminently threatened; furthermore, alternative and less drastic regulatory procedures are available which can properly balance the public need with the private loss. Without considering regulations which are sufficient in notably comparable areas, the Appellants seek the most drastic remedy available.

3. The Appellees, who by definition cannot receive any value for their property, are solely burdened with the complete loss of the value of their property. No opportunity of mitigation is offered.

Fairness and justice require that the Appellants cannot place such an impermissible burden upon the property and lawful occupation of the Appellees within the constitutional limits.

The District Court was correct in its conclusion that neither the Eagle Protection Act nor the Migratory Bird Treaty Act prohibit the Appellees from disposing of their property for value. To so apply the Acts, would create a grave question as to their constitutionality which can only be avoided by the exclusion of the items from the total prohibition sought by the Appellants.

ARGUMENT

I. Neither the Eagle Protection Act nor the Migratory Bird Treaty Act apply to pre-existing Indian artifacts. An interpretation that the acts ban all commercial transactions creates grave constitutional doubts as to their validity.

Appellants open their argument by positing that the record establishes two facts:[13]

1. Since genuine Indian artifacts are highly valued, a strong incentive exists to "pass off" recent copies as originals or to replace feathers in existing artifacts; and

2. There is no scientific test to determine the age of a feather.

The record does not support such assertions and Appellants' argument does not address the facts. The assertion

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[13]Brief of Appellants, page 13.

that the sale of antique artifacts has a causal relation to the killing of protected birds is an unfounded assumption.

This action is concerned with genuine feathered artifacts. Nowhere does the record support the Appellants' contention that counterfeits are or can be economically made or that "replacing feathers"[14] is an incentive to kill living birds. What the record does establish is that the Appellants have no basis to state or imply that a counterfeit market for Indian artifacts exists or that birds are being killed to supply the imagined market.[15]

The fact that a scientific test cannot date a feather does not preclude the ability to date an artifact of which the feathers are but a part. In reply to interrogatories, the Appellees have stated tests that can distinguish lawful artifacts; notably: documentation, personal knowledge, and expert appraisal.[16] The Affidavit of Dr. Alan Brush,[17] re-

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[14]The suggestion that one might "replace feathers" in a genuine artifact is contrary to common sense. The integrity and value of what would have otherwise been a genuine antiquity would be destroyed. Nothing in the record suggests that the value of any particular artifact depends upon the condition of its feathers.

[15]See Answers to Plaintiff's Interrogatories to Defendants, Second Set, Interrogatory No. 11.

Interrogatory No. 11: On a yearly basis from 1971 to date, state a general approximation of how many and what kinds of birds were "taken illegally" for the purpose of producing craft items similar to those types of items which are the subject of this action? (a) State the basis and source from which such approximations were provided.

Answer: The defendants are without knowledge or information sufficient to answer this interrogatory.

[16]See Appellants' Answers to Defendants' First Interrogatories to Plaintiffs, No. 1(c), Appendix, pages 50-60.

[17]Affidavit of Dr. Alan H. Brush, May 31, 1978, Appendix, pages 44-47.

lied upon by Appellants, in reality supports Appellees' position that exact age can be established by documentation and other circumstances surrounding an artifact.

Appellants continue by asserting that "stringent measures" are necessary to protect existing wildlife. While regulations and concern for protecting existing wildlife are certainly important, as this Court has noted in *TVA v. HILL,* 437 U.S. 153 (1978), the greatest threat faced by wildlife is the destruction of natural habitats. Appellants have not asserted that all sales of real property which could endanger destruction of habitat are unlawful. The sale of pre-existing artifacts bears no relation to the primary threat to wildlife. The logic inherent in proscriptive measures is stretched to its extreme when applied against antiquities. In notably parallel statutes[18] the "stringent measures" to protect other endangered wildlife do not require the complete commercial ban of antiquities.

Moreover, the Appellants' position that the Migratory Bird Act requires "stringent measures" to protect wildlife from sales of antiquities was made untenable by the actions of the Department of Interior which recently killed millions of grackles and blackbirds (birds which are included in the Migratory Bird Conventions), pursuant to Public Law 94-297, 94th Congress, February 4, 1976.

How can Appellants argue that the sale of an antique artifact including a grackle or blackbird feather endangers the protection of species in view of their own actions?

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[18]Marine Mammal Protection Act, 16 USC §1361, especially §1372(e). See also 50 C.F.R. §18.25, 50 C.F.R. §18.14. Endangered Species Act of 1973, 16 USC §1531 *et seq;* and particularly the 1978 amendment to the Endangered Species Act, Public Law #95-632, 92 Stat. 3760-3761. See also 50 C.F.R. §17.4.

Appellants' intimation that the killing of eagles for "commercially motivated" purposes[19] has something to do with Indian artifacts is wholly unsubstantiated. The report of destruction of eagles which was a part of the basis for the 1972 Amendment to the Eagle Protection Act[20] relates to deplorable killings which were an abject waste of the birds. There is no suggestion of any "commercial" motive; nor any suggestion of an intent to sell the birds which were killed, much less to use them in an attempt to counterfeit Indian antiquities.

An analysis of the legislative intent of the Migratory Bird Act demonstrates, contrary to the position of the Appellants, that the Act was not intended to and does not apply to pre-existing art. The terms of the Act do not include any pre-existing items. The obvious intent of the statute is to protect living birds.

In *Missouri v. Holland,* 252 U.S. 416, 642 L Ed 641 (1920), the facial constitutionality of the Act was upheld by this Court. Its decision was based upon the consideration of living birds, not a regulation of commerce of existing Indian art:

> " . . . Wild birds are not in the possession of anyone; and possession is the beginning of ownership." *id* at 434

The Court further noted:

> " . . . The subject matter is only transitorily within the state, and has no permanent habitat therein." *id* at 435

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[19]Brief for the Appellants, page 16.

[20]Senate Report #92-1159. U.S. Congressional and Administrative News, 1972, pages 4285-4288.

The artifacts in question do not have the same nature as a living bird of which the Court noted " . . . yesterday [had] not arrived, tomorrow may be in another state, and in a week a thousand miles away." (*id* at 434)

Six Federal District and Circuit Courts have considered the application of the Migratory Bird Act to previously existing property. Each has determined that the Act does not include such property. In over fifty years of consideration, no Court has accepted the position of the Appellants.

In *United States v. Fuld Store,* supra, footnote 4, the District Court of Montana considered the interpretation of the Act regarding lawfully acquired feathers. The Court noted that the intent of the Act was prospective:

> " . . . to protect birds in the future to make killing them in the future a crime, and incidentally to make possession or offer of sale of any part of the birds unlawfully killed (that is, killed in the future) also a crime." *id* at 837

The Court's conclusion, as expressed at pp. 837-838:

> " . . . the act relates only to birds and parts of birds killed subsequent to the act, a permissible and more reasonable construction, and in principle always to be preferred to avoid grave doubts of the validity of the law otherwise."

Similarly, in *United States v. Marks,* 4 F2d 420 (S.D. Tex. 1925), the District Court for the Southern District of Texas, stated, after noting that the Congressional power to regulate migratory birds derived from the Treaty Power and not otherwise:

> "In light of this principle, the act (Migratory Bird Act) must be construed as entirely prospective in its operation as to taking or killing birds,

> and so as not to convert into a penal act either the possession or sale of a bird, or part of a bird, taken before its enactment." *id* at 421

The interpretation that the Migratory Bird Act applies only prospectively is not limited to cases from the 1920's.[21] In *United States v. Aitson* (10th Cir. #74-1588, unpublished opinion, July 21, 1975) the United States Tenth Circuit Court of Appeals considered the applicability of the Migratory Bird Act to pre-existing feathers and concluded that commerce in such material was not illegal. The Court stated that the pre-existing nature of feathers would be an "apparent" defense to prosecution under the Act.

In *United States v. Blanket,* 391 F. Supp 15 (W.D. Oklahoma 1975), the District Court assumed (without the necessity of deciding) that possession prior to the effective date of the Act is a defense against the prosecution for selling after the effective date of the Act; but upon the evidence presented, the Court found that the Defendant had failed to satisfactorily establish the pre-existing nature of the material.[22]

In *United States v. Hamel,* 534 F2d 1354 (9th Cir. 1976), the Ninth Circuit Court implied that the Migratory Bird Act did not proscribe commerce in pre-existing items; however, since the Defendant had offered no evidence to support the proposition that the birds were taken before

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[21]See also In Re Information under Migratory Bird Treaty Act, 281 F 546, (D. Montana 1922).

[22]This case additionally establishes the fact that a successful prosecution can be maintained and proved against a defendant who asserts the pre-existing nature of particular feathers; the expert witness presented by the prosecutor did establish, beyond a reasonable doubt, that the materials therein being considered were not pre-existing items.

the Act's effective date, the Court was not required to specifically state its determination.

Considering similar legislation, the New York Court of Appeals in *A. E. Nettleton Co. v. Diamond,* supra, stated (citing from 44 ALR3d at 1005):

> "As to the Industry's contention that the Mason Law is confiscatory in that it bars all sales, or offers for sale, after September 1, 1970, thus rendering valueless the inventory on hand and imported into the State while it was legal to do so, we do not think that such a result was the intent of the Legislature. Such a prohibition could in no way effectuate the purpose of the Mason Law since it could not afford protection to the animals already destroyed. It is, therefore, our view that the Mason Law does not apply to skins, hides, or products therefrom which arrived in the United States of America on or before August 31, 1970, providing that the time of arrival shall be documented either by official U. S. Customs records or authentic inventory or shipment records of the holder or any predecessor in title which is a United States corporation, firm, or person legally engaged in the business of handling the products on August 31, 1970."

The Appellants' interpretation of the Act lacks judicial support.

Further, the legislative history and the language of the Act and conventions compel the conclusion that pre-existing artifacts are excluded from the prohibitions.

The Migratory Bird Act does not define the birds given protection. Such definition is provided only by the Conventions themselves.

In 1974, the Migratory Bird Act was amended to include the Convention between the United States and the Government of Japan. The language of the Convention between the United States and Japan directly excludes lawfully obtained materials. Article III of the Convention provides:

ARTICLE III

> I. The taking of the migratory birds or their eggs shall be prohibited. Any sale, purchase or exchange of these birds or their eggs, *taken illegally,* alive or dead, any sale, purchase or exchange of the products *thereof,* or their parts shall also be prohibited." (emphasis supplied)

Mr. Nathaniel P. Reed, Assistant Secretary of the United States Fish and Wildlife Service,[23] expressed this exact interpretation of the Convention in the official agency comment of the United States Department of the Interior to the Chairman of the Committee on Commerce. As stated by Mr. Reed, then the Assistant Secretary of the Interior:

> "The Convention contains a provision that prohibits the taking of migratory birds or their eggs.

[23]Mr. Reed, as Assistant Secretary of the United States Fish and Wildlife Service, Department of the Interior, was an original party. Mr. Reed's successor in office is a present party Appellant. Regarding the impact of conservation laws upon persons who have already owned various materials Mr. Reed also stated his "great concern [that] individual legally possessed, prior to the enactment of the 1973 Act [Endangered Species Act] parts or products of endangered species for the purpose of sale or for other activities of a commercial nature." Letter from Nathaniel Reed to Carl B. Albert, September 30, 1975, reprinted in H.R. Rep. #94-823, 94th Congress, 2nd Sess., 8 (1976) US Congressional and Administrative News, 1976, page 1691.

> It also prohibits the sale, purchase or exchange of these birds or their eggs, *taken illegally,* alive or dead, and the products thereof or their parts." (emphasis supplied)
>
> (U. S. Code, Congressional and Administrative News, 93rd Congress, 2nd Sess. 1974, Vol. 2, p. 3254)

The Appellees do not challenge Mr. Reed's interpretation of the Convention.

Nor do Appellees challenge any restrictions imposed upon the taking or subsequent use of existing wildlife. Appellees do not claim any rights to the continued killing of protected wildlife or commercial use of any such animal.[24] However, imposing substantial restrictions on, or prohibiting absolutely, the future taking or use of wildlife is fundamentally different from abrogating property rights in material privately owned prior to any restrictive legislation.

Appellants, by citing various conservation cases[25], ignore the fundamental property issue presented by this case. In each of the cases cited, the proscription contemplated future takings of wildlife. As the statutes being considered prohibited the "possession" of wildlife of a particular type, an obvious *ex post facto* situation would be presented if any of these Acts were to be applied to previously owned specimens or products. Statutes limiting

[24]See footnote No. 3, supra.

[25]*Bayside Fish Co. v. Gentry,* 297 U.S. 422 (1936); *State v. Shattuck,* 96 Minn 45, 104 NW 719 (Sup. Ct. 1905); *Commonwealth v. Savage,* 155 Mass 278, 29 NE 468 (Sup. Jud. Ct. 1892); *People v. Dornbos,* 127 Mich 136, 86 NW 529 (Sup. Ct. Mich., 1901); *Javins v. United States,* 11 App. D.C. 345 (1897); *Maritime Packers v. Carpenter,* 99 NH 73, 105 A2d 33 (Sup. Ct. 1954); *Salasnek Fisheries, Inc. v. Cashner,* 9 Ohio App2d 233, 244 NE2d 162 (Ct. App. 1967).

or prohibiting the future killing and imposing restrictions upon the use of anything so taken do not create the present issue.

Appellants suggest[26] that the intent of the Migratory Bird Act can be ascertained by a review of the "scope of comparable statutes."

One of the comparable statutes, the Endangered Species Act of 1973, supra, intending the preservation of endangered species the "highest of priorities",[27] nonetheless *exempts* any pre-existing item not being held for commercial purposes on December 28, 1973.[28].

Section 1538(b) provides:

> "(b) Species held in captivity or controlled environment. The provisions of this section shall not apply to any fish or wildlife held in captivity or in a controlled environment on the effective date of this Act (Dec. 28, 1973) if the purposes of such holding are not contrary to the purposes of this Act; except that this subsection shall not apply in the case of any fish or wildlife held in the course of a commercial activity. With respect to any act prohibited by this section which occurs after a period of 180 days from the effective date of this Act (Dec. 28, 1973), there shall be a rebuttable presumption that the fish or wildlife involved in such act was not held in captivity or in a controlled environment on such effective date (Dec. 28, 1973)."

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[26]Brief for the Appellants, page 26.

[27]*TVA v. Hill*, 437 U.S. 153 (1978).

[28]Any antiquity being held in a private collection on December 28, 1973, appears to be thereafter exempted from the prohibitions of the Endangered Species Act. See example No. 2, 50 C.F.R. §17.4(a).

The statute contemplates future commercial transactions with respect to pre-existing articles. A rebuttable presumption is established, but the exemption itself is granted. The scope of this statute, dealing solely with those animals requiring the greatest protection does not support a more inclusive presumption for the Migratory Bird Act.

The comparable Marine Mammal Protection Act also excludes pre-act property.[29]

Considering the language of the Act, comparing it with similar conservation statutes, and as universally interpreted by the Courts, the Migratory Bird Act does not apply to pre-existing Indian artifacts in which private rights had vested prior to the date of the statute.

The intent of the Eagle Protection Act to include pre-existing artifacts is even less apparent than the Migratory Bird Act. The Eagle Act to this date does not include "products" within its proscriptive terms. An ordinary interpretation of the Act would not include craft items created before the Act; feathers used as components had already lost their identity as "eagles" or "parts."[30] One does not consider a painted shield containing feathers on its perimeter an "eagle" nor "feathers"; through human effort, the raw materials had already become something else. The Eagle Protection Act does not encompass pre-existing craft items in which the component parts had lost a separate identity prior to the passage of the Act.

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[29]See footnote no 18, supra

[30]See: *United States v. Richards*, 583 F2d 491 (10th Cir. 1978). The distinction between "birds" and "artifacts" was noted by the Court in distinguishing its decision from the decision of the District Court in this action.

More importantly, however, the interpretation urged by the Appellants reduces the Eagle Act to an absurdity, incapable of promoting its protective intent.

At page 15 of their brief, Appellants state that "gratuitous transfers" are condoned, but "commercial" transfers are not. The Act does not require the destruction of feathered artifacts nor a physical separation of the feathers at the time of the lawful sale of the wood, hide, cloth, and paint also composing "the" artifact. Since artifacts are composed only in part of feathers, often a small part, nothing prevents a sale of the "lawful" portion of the artifact and a "gratuitous" transfer of the outlawed feathers.[31] But what is the purpose of the exercise? Worse, what is the purpose of requiring the offending feather to be cut off so the balance of the "artifact" can be sold without question: a bastardized relic not indicative of its heritage, but a monument to formalism and misplaced intent?

The Eagle Protection Act, in its silence concerning pre-existing native art, must be reasonably interpreted to accomplish its purpose: a purpose which cannot be furthered by permitting "gratuitous" transfers of feathers and "commercial" sales of the other components of the whole. An interpretation requiring the destruction of antiquities to make the remnants "lawful" is a cultural tragedy.

CONSTITUTIONALITY

II. Neither the Eagle Protection Act nor the Migratory Bird Treaty Act can constitutionally prohibit all sales of pre-existing American Indian Artifacts. To do so would be an unwarranted and impermissible burden upon property rights afforded by the Fifth Amendment.

[31] It is not at all certain that the separation of the components of a sale would constitute a sham. Certainly no sham transaction would be involved if the offending feathers were physically removed from the artifact at the time of sale and subsequently gratuitously conveyed.

Pre-existing artifacts constitute private property to be afforded constitutional protection.

It has long been recognized that the possession of wildlife creates a property right. *Shouse v. Moore,* 11 F Supp 784 (ED Kentucky 1935).

On several occasions, this Court has noted that private property rights vest when wildlife is reduced to possession and thereafter become articles of commerce. See *H. P. Hood and Sons, Inc. v. DuMond,* 336 U.S. 525 (1949); *Douglas v. Sea Coast Products, Inc.,* 431 U.S. 265 (1977); *Foster-Fountain Packing Co. v. Haydel,* 278 U.S. 1 (1928); see also *Missouri v. Holland,* supra, p. 10.

Any speculation that the pre-existing artifacts are somehow "special" private property, subject to more restrictive regulation because they are made from natural materials, has been dispelled by this Court in *Hughes v. State of Oklahoma* (#77-1439, April 24, 1979, 47 Law Week 4447):

> " . . . regulation of wild animals should be considered according to the same general rule applied to state regulations of other natural resources, and therefore (we) expressly overrule *Geer.*" *id* at 4451

This Court has also recognized that the right of disposing of property is an essential attribute of ownership. See *Goldblatt, et. al. v. Town of Hempstead,* 369 U.S. 590 (1960); *Mugler v. Kansas,* 123 U.S. 623 (1887). It cannot be doubted that essential ownership rights are as much protected by the Constitution as the property itself. See *United States v. General Motors Corporation,* 323 U.S. 373 (1944); *Buchanan v. Warley,* 245 U.S. 60 (1917).

In considering the Constitutional claims, Appellants initially deny Appellees standing.

The bases of Constitutional challenge asserted by the Appellees were not limited solely to diminution of property values.

Appellees asserted an unconstitutional limitation upon their liberty of lawful occupation.[32] Two of the Appellees, Bovis and Allard, suffered criminal prosecution for the sale of pre-existing artifacts. The likelihood of further prosecution is noted by the record.[33]

Appellants' limited challenge to the standing of the Appellees does not address the multiple bases upon which standing is afforded. Moreover, the limited challenge itself is not sustainable.

Appellee Ward personally owned feathered Indian artifacts prior to the effective date (1972) of the Migratory Bird Treaty Act with respect to birds of the same type as those which had been used to make the artifacts; such is

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[32] *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), at page 572:

> "While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. 390, 399, 67 L Ed 1042, 1045, 43 S Ct 625, 29 ALR 1446. In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed.

[33] See Answers to Plaintiffs' Interrogatories to Defendants, Second Set, especially answers to interrogatories numbered 4, 6, and 8.

shown by the record.[34] The personal ownership of artifacts by the other Appellees prior to the 1972 Supplement and the 1974 Amendment to the Migratory Bird Treaty Act also exists, but is not specifically disclosed by the record as the particular standing question now asserted was not alleged in the District Court.[35]

Appellants' limited challenge for lack of "personal property rights" also overlooks the fact that Appellees not only possessed property rights in artifacts when the case was filed, but continue to possess the same property rights. Judicial construction of the Acts has universally affirmed private property rights in pre-existing materials.[36] Every Court which has considered the Acts has declared pre-existing material to be outside the proscriptions. Unless this Court shall retro-actively reverse the ruling of the District Court, and overrule all existing precedent, Appellees presently own property which can lawfully be sold for value. Standing to preserve such rights against the claims of the Appellants should be apparent.

Broadly stated, the basic issue is whether the Appellants' regulatory scheme places such a burden on the Appellees that "fairness and justice"[37] require that the impact

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[34] See answer of Appellee Robert G. Ward to defendants' interrogatory no 17, Appendix, page 54. Priority of ownership is established by comparison of types of feathered artifacts listed by appellee Ward with effective date of inclusion of particular type of birds within the Migratory Bird Treaty Act, supra footnote 10.

[35] Appellants' jurisdictional challenge in the District Court was based upon a lack of "case or controversy" upon the supposed non-existence of the threat of enforcement. In light of the fact that two of the Appellees had actually been prosecuted for violation of the Acts, the District Court did not sustain the motion of the Appellees.

[36] See: supra p. 11-13.

[37] *Armstrong v. U.S.*, 364 U.S. 40 (1960).

cannot be borne solely by the few who are directly affected. The precedent of Courts for fifty years, from Montana to Texas and from the Tenth Circuit to the State of New York is unanimous: fairness and justice do not permit the complete destruction of property rights in pre-existing artifacts. In reviewing the broad precept, this Court should not lightly weigh such an unanimity of expression.

The Constitutional touchstone for reviewing the limits of police powers remains Mr. Justice Holmes' statement in *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922), that:

> "As long recognized, some values are enjoyed under an implied limitation, and must yield to the police power. But obviously the implied limitaion must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act." *id* at 413

Similarly, the statement of the test regarding the reasonableness of the exercise of the police power was provided by this Court in *Lawton v. Steele*, 152 U.S. 133, at page 137, (1894); restated in *Goldblatt*, supra, at 594:

> "To justify the state in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals."

Practical criteria, useful for a resolution in accord with the stated policies, were enumerated by this Court in *Goldblatt* and most recently reviewed in *Penn Central Transportation Company, et. al. v. City of New York, et. al.*, 57 L Ed2d 631, (#77-444, June 26, 1978):

1. A comparison of values of the Complainants' property before and after the regulation is imposed, is a relevant factor.[38]

2. The purpose of the legislation and its direct relation to the health and safety of the population is of importance.[39]

3. The nature of the menace against which the regulation will protect and the availability and effectiveness of other less drastic protective steps are important considerations.[40]

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[38] See: *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958); *Pennsylvania Coal Co. v. Mahon*, supra.

[39] See especially *Mugler v. Kansas*, supra; *Murphy v. California*, infra p. 25; also see Mr. Justice Rehnquist (dissenting), *Penn Central Transportation Co.*, supra at 57 L Ed 631:

> "The nuisance exception to the taking guarantee is not coterminous with the police power itself. The question is whether the forbidden use is dangerous to the safety, health, or welfare of others."

[40] *Goldblatt*, supra; also see *Shelton v. Tucker*, 364 U.S. 479 at 488 (1960):

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."

4. The existence of an "average reciprocity of advantage" is a factor.[41]

While a "taking" may be more readily found when the interference with property can be characterized as a physical invasion by the government,[42] such a limited reading of the protection afforded by the Constitution has long since been relegated to the rank of an academic curiosity.[43]

In *United States v. General Motors Corporation*, supra, at page 378, this Court has noted that it is the:

> ". . . deprivation of the former owner rather than the accretion of a right or interest to the sovereign (that) constitutes the taking."

In the instant case, the Appellants would absolutely prohibit the Appellees from disposing of their property for value. The destruction of value of the Appellees' property

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[41] *Pennsylvania Coal Co. v. Mahon*, supra; also see Mr. Justice Rehnquist (dissenting) *Penn Central Transportation Co.*, supra, 57 L. Ed2d 631 at 662-663;

> "Even where the government prohibits a non-injurious use, the Court has ruled that a taking does not take place if the prohibition applies over a broad cross section of land and thereby 'secure[s] an average reciprocity of advantage.' [citations omitted] It is for this reason that zoning does not constitute a 'taking.' "

[42] See *Mugler v. Kansas*, supra; *Penn Central Transportation Co.*, supra.

[43] See VanAlstyne "Takings or Damaging by Police Power: The Search for Inverse Condemnation Criteria," 44 SoCal Law Review 1, (1971) at Page 7

is not just a consequence, but is the purpose of the regulation.[44]

Nor can the Indian artifacts collected by the Appellees constitute a nuisance or property which *of itself* is a harmful commodity. Cases cited by the Appellants, predominately *Mugler v. Kansas*, supra, and *Murphy v. California*, 225, U.S. 623 (1912),[45] are simply not applicable. Indeed, far from being harmful commodities or nuisances in themselves, the artifacts are of substantial cultural importance and have been declared to be objects for national preservation and concern. [46]

Additionally, in *Mugler*, supra, the assumption of a continued interstate market was an additional factor presented to the Court. Mugler chose not to avail himself of the potentially lawful market and thus utilized his prop-

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[44] *Armstrong v. U.S.*, 364 U.S. 40 at 48 (1960);

> "It is true that not every destruction or injury to property by governmental action has been held to be a "taking" in the constitutional sense. . . . This case and many others reveal the difficulty of trying to draw the line between what destruction of property by lawful governmental actions are compensable "takings" and what destructions are "consequential" and therefore not compensable." [citations omitted]

[45] It is certain that Mr. Justice Lamar, speaking for the Court, was convinced that the keeping of a billiard hall was beyond question an activity harmful in itself:

> "That the keeping of a billiard hall has a harmful tendency is a fact requiring no proof, and incapable of being controverted . . . The fact that there had been no disorder or open violation of the law does not prevent the municipal authorities from taking legislative notice of the idleness and other evils which result from the maintenance of a resort where it is the business of one to stimulate others to play beyond what is proper for legitimate recreation."

The decision of the Court in this case is unparalleled in its statement of "uncontroverted" fact and the scope of legislative notice accepted.

[46] See supra footnote 5.

erty contrary to the law of the State where such had been determined to be an actual nuisance and harmful in itself to the health and welfare of the community. No Fifth Amendment question was recognized.

Jacob Ruppert v. Caffey, 251 U.S. 264 (1920), while the decision was based upon the war power, did reject the claim that property was "taken." Even so, on the record presented to the Court, the existing stocks of beer were assumed to have been produced subsequent to the passage of the Volstead Act. Rather than support the position that pre-existing property can be destroyed, *Ruppert* is only consistent with the position that an an illegal product – one made with an illegally taken animal – creates no rights in the holder. Appellees state no disagreement.

The ordinance upheld by this Court in *Goldblatt,* supra, was passed as a "safety ordinance" having a direct relationship to the health and safety of the citizens. The direct protection of the safety of citizens by prohibiting a noxious use of the property, even so, is limited to those restrictions which abate the nuisance and which do not deprive a citizen of property absolutely. The prohibition upheld by this Court in *Hadacheck v. Sebastian,* 239 U.S. 348 (1915), was specifically distinguished from an ordinance prohibiting the valuable use of property in *Ex Parte Kelso,* 147 Calif 609, 82 P241 (1905) (*id* at 411-412).

As stated by Mr. Justice Field in *Mugler v. Kansas,* supra:

> "It has heretofore been supposed to be an established principle that where there is a power to abate a nuisance the abatement must be limited by its necessity, and no wanton or unnecessary injury can be committed to the property or rights of individuals." (dissenting opinion)

Where a danger can be eliminated by a less restrictive regulation than total prohibition, the Constitution protects

against an unwarranted scope of property invasion. See *Curtin v. Benson,* 222 U.S. 78 (1911). Also see *Shelton v. Tucker,* supra

In the present circumstances, the total ban applied to pre-existing artifacts goes far beyond that required to protect the legitimate interests of the public and is an unwarranted proscription of private property rights.

By citing *Ruppert,* supra, and *Everards Breweries v. Day,* 265 U.S. 545 (1924), Appellants apparently urge that the war power inherent in Congress absolves them from responsibility for the destruction of Appellees' property rights.

Appellees accept that the common law and this Court have long recognized that the sovereign is absolved from responsibility for destruction of property in doing what must be done in times of imminent peril.

As stated by this Court in *United States v. Caltex,* 344 U.S. 149 (1952), at page 154:

> ". . . the common law had long recognized that in times of imminent peril – such as when fire threatened a whole community – the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved."

The war power, however, provides no basis for the Appellants' position in this action.

Nor does this case present a "last ditch" effort in which other less restrictive regulations have failed. In its decision, the District Court made specific reference to the fact that other less drastic regulatory procedures existed, but that "the Defendants have failed to show any efforts to establish such a registration system."[47]

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[47]Opinion of District Court, Jurisdiction Statement, Appendix, page 5a.

Drawing upon similar precedent of a soverign's right to destroy property without compensation where no other alternative is presented, this Court, in *Miller v. Schone*, 276 U.S. 272, (1927) at 278-279 stated:

> "The only practicable method of controlling the disease and protecting apple trees from its ravage is the destruction of all red cedar trees, subject to infection, located within two miles of apple orchards. . ."

Even in *Miller*, however, the Court noted that there could not be a blanket destruction of cedars. Destruction was permissible only after the state official had determined, after investigation, that conditions of proximity and disease necessitated destruction.

Particularly in light of the exemptions afforded to certain antiques by the Endangered Species Act of 1973[48] and the exemptions afforded pre-existing artifacts under the Marine Mammal Protection Act,[49] exemptions allowing some commercial uses under the Migratory Bird Treaty Act,[50] and the obvious regulatory provisions which could

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[48]See supra footnote 18.

[49]See supra footnote 18.

[50]See 50 C.F.R. §20.91:

> "§20.91Commercial use of feathers.
> Any person may possess, purchase, sell, barter, or transport for the making of fishing flies, bed pillows, and mattresses, and for similar commercial uses the feathers of migratory water fowl (wild ducks, geese, brant, and swans) killed by hunting pursuant to this part, or seized and condemned by Federal or State game authorities . . . "

That a person can sell a "mattress full" of feathers from newly killed water fowl, but not an antique artifact containing a feather from the same water fowl which was taken in the remote past stretches the logic of the "protective intent" of the Appellants to its utmost.

establish the legitimacy of a particular artifact, the Appellants cannot argue that the sovereign is faced with an imminent and impossible choice permitting such destructive powers as are sought. The 1978 amendment to the Endangered Species Act pursuant to Public Law 95-632, 92 Stat. 3760, 95th Congress, 2nd Session, further suggests that outright prohibitions against all commercial transactions for pre-existing artifacts is unwarranted. The amendment recognizes, most importantly, that documentation can be required, and that the genuineness of an antique artifact can be thus determined.

Far from foreclosing the argument of the Appellees, the recent determinaiton by this Court in *Penn Central Transportation Company v. New York City*, supra, supports the Appellees' view that the confiscatory regulation in the instant case is one which has gone "too far."

In *Penn Central*, Mr. Justice Brennan noted that the major theme of the New York City Landmark Act was to " . . . ensure the owners of any such property both a 'reasonable return' on their investments and maximum latitude to use their parcels for purposes not inconsistent with the preservation goals . . . " (*id* at page 639). The Court further noted (*id* at 651) that the parties accepted for purposes of the case:

> ". . . both that the parcel of land occupied by Grand Central Terminal must in its present state, be regarded as capable of earning a reasonable return and that the transferable development rights afforded Appellees by virtue of the Terminal's designation as a landmark were valuable, even if not as valuable as the right to construct above the Terminal."

The elaborate provisions designed to protect vested property rights afforded by the New York Landmark Act

are nowhere presented in the regulations offered by the Appellees in this action.

Nor is any "reciprocity of advantage"[51] offered to the Appellees by the regulations being reviewed. Appellees must bear the complete loss of the value of their property; Appellees' property, by definition, cannot benefit from any other's restriction. Apellees' receipt of value has been made unlawful.

In *Penn Central*, supra, the Court did affirm the Constitutionality of certain restrictions, finding, however, no indication that Penn Central was permanently foreclosed from development of its property: (1) It had not sought approval for the construction of a smaller structure; and (2) the development rights were not abrogated, but were transferable to at least eight parcels in the vicinity of the Terminal.

In the instant action, Appellants would permanently foreclose the Appellees from receiving any value for their collections. No opportunity is to be afforded to the Appellees, suffering a total abrogation of value, to mitigate such harm.

Appellants' citation of cases decided under the Endangered Species Act do not support their position that other regulations are as stringent as those which are pressed in the instant case.

As noted[52] the Endangered Species Act, provides for an exclusion of pre-existing material. Moreover, pursuant to Section 1538(a)(1)(D), the only general prohibition against possession or sale is for any species "taken in violation" of the Act. Such limited application is a critical distinction.

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[51]See supra footnote 41.

[52]See supra p. 16.

As further noted by United States Court of Appeals, Sixth Circuit, in *United States v. Kepler,* 531 F2d 796 (Sixth Circuit 1976), an intrastate market was not foreclosed by the Endangered Species Act. As a continued market was assumed to exist, no Fifth Amendment question was yet presented. *Delbay Pharmaceuticals, Inc. v. Department of Commerce,* 409 F Supp 637, (D.DC, 1976) is similarly distinguished.

Appellants, attempting to minimize the apparent loss of value suffered by the Appellees assert that such artifacts continue to have value:

> "They are still objects of rarity and interest that can be possessed for personal enjoyment or displayed for profit."[53]

Such skeletal remains of the body of private property rights cannot resuscitate the Acts.

As expressed by Mr. Justice Rehnquist, dissenting in *Penn Central*, supra, at page 6645:

> "A taking does not become a noncompensable exercise of police power simply because the government in its grace allows the owner to make some 'reasonable' use of his property. [I]t is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking." (citations omitted)

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[53]Brief of Appellants, page 33. The concession that a "commercial" use can be made of feathered artifacts is not consistent with Appellants' prior position that *all* commercial uses of pre-existing artifacts must be foreclosed to eliminate the incentive of taking new wildlife. Regardless, a collection of antique artifacts is not the type of property that can generate income by being "displayed for profit." Art collections are loaned to museums and other similar institutions for display, but Appellees are unaware that such collections are otherwise "displayed for profit."

The "reasonable" uses left to the Appellees are the merest veneer of rights. Tested by the hypothesis of *U.S. v. Dickinson*, 331 U.S. 745 (1947), the taking of the heart of Appellees' property rights is apparent:

> "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired." *id* at 748

The subject matter involved in most of the reported decisions concerning the "taking" question is real property.

Whether real or personal property, however, constitutional protection is afforded. There is little doubt that if the restrictions which the Appellants seek were applied to real property such as that affording habitat to wildlife, the total prohibition of the sale of this "pre-existing" property would be invalidated on its face.

A servitude has undoubtedly been acquired; one which in real property terms would almost certainly constitute an invalid restraint upon alienation if imposed by private parties.

Appellants have stated and continue to state that the intent of the restrictions is to destroy the value of the Appellees' property.[54] The loss of value and the restriction upon the Appellees' lawful occupation is not merely a consequence of regulation. No exemptions, permits, or other administrative relief is afforded.

The Migratory Bird Treaty Act and the Eagle Protection Act which are the subject of this action are not the only wildlife conservation statutes which have been passed by Congress, and moreover, are not concerned solely with wildlife actually threatened with extinction. Nonetheless, Appellants assert that the drastic measures relating to antiquities are required to enforce the Migratory Bird Act and the Eagle Protection Act while such measures are not insisted upon, nor would they be legislatively authorized, under the Marine Mammal Protection Act or the Endangered Species Act. Less drastic procedures such as documentation and registration are readily available to distinguish lawful artifacts, yet the Appellants reject this avenue out of hand, notwithstanding that such is granted by comparable statutes.

[54] Brief of Appellants, pages 13-15.

Nor does the Tucker Act, 28 USC §1491, provide the sole remedy to the Appellees in this action.

This action was brought pursuant to the Declaratory Judgment Act, 28 USC §2201, which, while not extending the jurisdiction of the Federal Court, does provide an additional remedy.

More importantly, as concluded by the District Court, neither the Eagle Protection Act nor the Migratory Bird Treaty Act were intended to apply to pre-existing Indian artifacts. Certainly no intent to condemn or purchase every feathered artifact in the country can be remotely inferred from the language of the Acts.

The application of the Acts by the Appellants to previously existing feathered Indian artifacts is unauthorized and therefore cannot be the act of the government. The Tucker Act affords no remedy in such circumstance. See *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).

CONCLUSION

The District Court was correct in its determination that neither the Migratory Bird Treaty Act nor the Eagle Protection Act applies to pre-existing antiquities.

The Acts must be reasonably applied to protect living birds and to distinguish existing private property by reasonable regulation, not prohibition.

The Acts must be applied so as to avoid the absurdity of dividing "gratuitous" and "commercial" transactions. Such interpretation is incapable of proof and incapable of furthering their protective intent.

The Court was correct in its decision to avoid the grave constitutional doubt of the validity of the Acts by excluding previously existing, lawfully acquired, feathered Indian artifacts from the prohibitions of the statutes.

The decision of the District Court should be affirmed.

Respectfully submitted.

AKOLT, DICK AND AKOLT
John P. Akolt, Jr.
John P. Akolt, III

June 1979

No. 78-740

In the Supreme Court of the United States

OCTOBER TERM, 1978

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL., APPELLANTS

v.

L. DOUGLAS ALLARD, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

REPLY BRIEF FOR THE APPELLANTS

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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REPLY BRIEF FOR THE APPELLANTS

1. Appellees' suggestion (Br. 10) that nothing in the legislative history of the Eagle Protection Act indicates that Congress was concerned with Indian artifacts is incorrect. When the House amended the Act to include golden eagles in 1962, it was specifically noted that the protection was necessary because "[t]he sale of feathers to dealers, curio shops, and Indian tribes has become a lucrative business." 108 Cong. Rec. 5511 (1962) (Rep. Goodling). See also *id.* at 5511, 5513 (articles noting existence of market for feathers); H.R. Rep. No. 1450, 87th Cong., 2d Sess. 2 (1962). The impossibility of identifying the feathers thus sold as having been taken from birds recently killed is demonstrated by the record here (A. 44-46), and amply justifies the congressional

determination to permit only the possession and transportation, but not the sale, barter, or exchange of pre-Act feathers.[1]

This legislative history also refutes appellees' claim (Br. 17) that since the Eagle Protection Act does not refer to "products," it does not comprehend eagle parts used as components of craft items created before the enactment of the Act. The underlying premise of this argument is that eagle parts lose their identity once they become parts of something else. Appellees suggest no reason why that principle should apply only to feathers already incorporated into other products when the Act became effective. Acceptance of appellees' argument would render the Act ineffective to stem the "lucrative business" in eagle feathers which was one of Congress' concerns, for evidently the primary interest of dealers, curio shops and Indian tribes in feathers is as a material for incorporation into craft items.

2. Appellees claim (Br. 13-15) that certain language in the prohibition section of the Japanese Treaty demonstrates that the Migratory Bird Treaty Act applies only to birds alive at the time the Act became applicable to them. Our main brief explains why this language is

[1]Appellees note (Br. 8) that nothing in this record establishes that a market for feathers actually exists. But it has long been recognized that "where the legislative judgment is drawn in question, [the judicial inquiry] must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it." *United States* v. *Carolene Products Co.*, 304 U.S. 144, 154 (1938).

ambiguous (Br. 23 n.31).[2] We add only that the Act refers to the various treaties to determine the birds covered by the Act, but not to define the prohibitions applicable to them. Those are contained in the Act itself, 16 U.S.C. 703.[3] It is accordingly appropriate to consult the sections of the various treaties that describe their coverage, rather than their prohibition provisions, to determine the scope of the Act. As noted in our main brief (Br. 21-23), all the treaties involved define the birds covered in terms of their species or families, thus including both alive and dead specimens of the described varieties.

3. Appellees contend (Br. 16-17) that the fact that comparable legislation contains specific exemptions for pre-existing animal products justifies reading a similar exemption into the Acts involved here. But those provisions suggest instead that when Congress intended such an exemption, it provided for it explicitly, defining precisely the circumstances in which it was to be applicable. Moreover, the provision in the Endangered

[2]Appellees' resolution of the ambiguity is inconsistent with the clear language of the treaty with the Soviet Union, which expressly prohibits "any sale, purchase or exchange of these birds, whether dead or alive, or their nests or eggs, and any sale, purchase or exchange of their products or parts." T.I.A.S. No. 9073 (see our main Br. 6 n.10). If appellees are correct, pre-existing parts of birds covered by the Soviet treaty, but not those of birds covered by the Japanese Treaty, are within the Act. This would create needless administrative confusion.

[3]The Act necessarily contemplates that the prohibitions in the Act are broader than those required by the treaties, since the Secretary is authorized to grant exemptions to the prohibitions in the Act when such exemptions are "compatible with the terms of" the treaties. 16 U.S.C. 704. Thus, at most, appellees' interpretation of the Japanese Treaty means that the Secretary could, in his discretion, exempt the pre-existing parts of birds covered by the Japanese Treaty from the Act.

Species Act on which appellees primarily rely, 16 U.S.C. 1538(b), does not apply to "wildlife held in the course of a commerical activity," and thus would not benefit appellees even if it were read into the Acts at issue here.[4]

4. Appellees maintain (Br. 20-21) that at least appellee Ward has standing to assert an unconstitutional taking of his property.[5] The record shows that he acquired his artifacts, all but one of which contain eagle feathers (A. 52-53), between 1968 and 1973 (A. 54).[6] Appellees also note that eagles were not included in the Migratory Bird Treaty Act until 1972 (Br. 4 n.10). But since the Eagle Protection Act has protected bald eagles since 1940, and was extended to the golden eagle in 1962, the record in fact demonstrates that Ward did not acquire the right to sell the eagle feathers when he purchased the artifacts after 1962 (A. 53-54).[7]

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[4]This exception is explained in the Conference Report, H.R. Rep. No. 93-740, 93d Cong., 1st Sess. 27 (1973): "[T]he provision * * * create[s] an affirmative defense with respect to noncommercial activities, permitting a qualified person to plead in defense to a charge of violation of the Act that the goods or animals themselves were in their hands or under control on the effective date of the Act. Only persons holding such goods and animals for other than commerical purposes would be enabled to plead this subsection as a defense, such as noncommerical zoos, private collectors of animals and the owners of fur coats and rugs."

[5]Appellees' apparent suggestion (Br. 21) that their standing to raise alternative, subsequently abandoned, constitutional challenges somehow carries with it standing to assert the constitutional claims they assert in this Court is without merit.

[6]The single exception contains possible prairie chicken feathers (A. 53), but prairie chickens are not subject to the Migratory Bird Treaty Act (42 Fed. Reg. 59358-59362 (1977)). Moreover, the record does not show whether Ward obtained the two artifacts containing feathers of protected birds in addition to eagle feathers before those birds came under federal protectiom in 1972.

[7]Since those purchases were themselves in violation of the Eagle Protection Act, appellee Ward does not have clean hands in seeking the equitable remedy of a declaratory judgment.

Appellees' argument on the merits of the constitutional issue is flawed by the assumption that the Acts prohibit the sales of the artifacts themselves, rather than simply of the feathers they contain. While it is true that the Acts prohibit the purchase or sale of the artifact so long as it includes the feathers, nothing in the Acts prohibits any dispesition of the artifact without the feathers. It is by no means clear that the inability to sell the feathers has deprived the artifacts of all commercial value, since, as appellees themselves recognize, "artifacts are composed only in part of feathers, often a small part" (Br. 18; see A. 50-59). Therefore, independently of the objections to appellees' constitutional claims identified in our main brief, the record here is insufficient to support their claim of an unconstitutional taking.[8] In the absence of any showing of how the value of any particular artifact is related to the value of the feathers it contains, or how its value would be affected if the feathers were removed (and perhaps replaced with artificial facsimilies), the "essentially ad hoc, factual inquiries" to determine the economic impact of the Acts on the appellees, and the extent to which they have "interfered with distinct investment-backed expectations" (*Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978)) simply cannot be

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[8]Under the analysis in Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 61-62 (1964), cited in *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 125 (1978), the Acts at issue here would not in any event involve the taking of private property for public use requiring just compensation under the Fifth Amendment, since they result in no benefit to any government enterprise. Instead, they more closely approximate the situation in which the government is actng as arbitrator between competing private interests; in that situation, Professor Sax argues, no compensation is constitutionally required. See also Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149 (1971).

made.[9] Since appellees have not shown that the Acts impose an unreasonable burden on them, they have failed to show their constitutional invalidity. *Goldblatt* v. *Hempstead*, 369 U.S. 590, 595-596 (1962).

For these reasons, as well as those discussed in our main brief, the judgment of the district court should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

SEPTEMBER 1979

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[9]The record does suggest that the economic impact of the Secretary's interpretation of the Migratory Bird Treaty Act on appellees is minimal.

Seven of the artifacts contain the feathers of eagles as well as birds protected by the Migratory Bird Treaty Act; the sale of those artifacts would be a violation of the Eagle Protection Act. Six contain only the feathers of unidentified birds, so the impact of the Treaty Act on them cannot be determined. Of the remaining five artifacts that do not contain eagle feathers, three contain only the feathers of birds not protected by the Migratory Bird Treaty Act (parrot and quail(A. 50), prairie chicken (A. 53); see 42 Fed. Reg. 59358-59362 (1977)). The remaining two artifacts contain flicker feathers. Althoiugh the flicker has been protected since 1918 (39 Stat. 1703), appellees date the artifacts in 1920 and the early 1940's (A. 50).